No. 97-2045-CSX Title: South Central Bell Telephone Company, et al., Petitioners
v.
Alabama, et al.

Docketed:
June 19, 1998 Court: Supreme Court of Alabama

Entry	Date	Proceedings and Orders
	Jun 18 1998	Petition for writ of certiorari filed. (Response due July 19, 1998)
	Jul 14 1998	Brief of respondents Alabama, et al. in opposition filed.
	Jul 16 1998	Brief amicus curiae of Tax Executives Institute, Inc. filed.
	Jul 20 1998	Motion of AlliedSignal, Inc., et al. for leave to file a brief as amici curiae filed.
	Jul 20 1998	Motion of Committee on State Taxation for leave to file a brief as amicus curiae filed.
	Jul 27 1998	Reply brief of petitioner South Central Bell Telephone Company, et al. filed.
	Jul 29 1998	DISTRIBUTED. September 28, 1998
	Sep 29 1998	Motion of AlliedSignal, Inc., et al. for leave to file a brief as amici curiae GRANTED.
	Sep 29 1998	Motion of Committee on State Taxation for leave to file a brief as amicus curiae GRANTED.
	Sep 29 1998	Petition GRANTED. limited to Question 1 and 2 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served uon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 19, 1999. **********
	Nov 9 1998	Brief amicus curiae of Tax Executives Institute, Inc. filed.
	Nov 10 1998	Brief amicus curiae of Committee on State Taxation filed.
	Nov 10 1998	Brief of petitioners South Central Bell Telephone Company, et al. filed.
	Nov 10 1998	Brief amici curiae of Avon Products, Inc., et al. filed.
	Nov 13 1998	Joint appendix filed.
	Nov 23 1998	CIRCULATED.
	Dec 7 1998	Record filed.
	Dec 8 1998	Brief of respondent Alabama, et al. filed.
	Dec 29 1998	Reply brief of petitioners South Central Bell Telephone Company, et al. filed.
	Jan 7 1999	Letter from counsel for respondents received.
	Jan 19 1999	ARGUED.

Supreme Court, U.S.
FILED
97 2045 JUN 18 1998
OFFICE OF THE CLERK

No. ———

In The Supreme Court of the United States

October Term, 1997

South Central Bell Telephone Company, *et al.*,
Petitioners,

v.

State of Alabama and
State Department of Revenue,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Walter Hellerstein
University of Georgia
Law School
Herty Drive
Athens, Georgia 30602
(706) 542-5175

Charles R. Morgan
Mark D. Hallenbeck
Albert G. Moore, Jr.
Richard W. Bell
BellSouth Corporation
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

Walter R. Byars
Steiner, Crum & Baker
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

Mark L. Evans *
Henk Brands
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

David J. Bowling
Courtney Hyers
CSX Transportation, Inc.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

151 pp

QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, following the same practice that this Court condemned in *Richards v. Jefferson County*, 517 U.S. 793 (1996), deprived petitioners of the due process of law guaranteed by the Fourteenth Amendment by barring them from presenting a federal constitutional challenge to a state tax on the theory that petitioners were bound by a prior state-court judgment in a case to which they were not parties, in which they were not represented, and of which they had no notice.

2. Whether Alabama's franchise tax impermissibly discriminates against interstate commerce, in violation of the Commerce Clause, by taxing Alabama corporations only on the par or stated value of their stock (the amount of which is determined solely by the corporation itself) while taxing out-of-state corporations on the value of essentially all their capital employed in Alabama, with the demonstrated result that Alabama corporations on average pay less than one-fifth of the franchise tax they would pay if they were incorporated outside Alabama.

3. Whether a taxpayer who has paid an unconstitutional state tax under legal compulsion and who then sues for a refund in accordance with applicable state refund procedures is entitled, under the Due Process Clause of the Fourteenth Amendment and this Court's decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Department of Revenue*, 118 S. Ct. 904 (1998) (per curiam), to meaningful backward-looking relief sufficient to rectify the unlawful exaction.

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceedings in the Alabama Supreme Court:

State of Alabama, State Department of Revenue
South Central Bell Telephone Company
BellSouth Telecommunications, Inc.
BellSouth Corporation
BellSouth Services, Inc.
BellSouth Financial Services Corporation
BellSouth Advertising & Publishing Corporation
BellSouth Resources, Inc.
BellSouth Products, Inc.
Alabama Cellular Services, Inc.
CSX Transportation, Inc.
Seaboard Coastline Railroad Company
Louisville & Nashville Railroad Company
Seaboard System Railroad, Inc.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following.

South Central Bell Telephone Company and BellSouth Services, Inc., are predecessors of BellSouth Telecommunications, Inc. Each of BellSouth Telecommunications, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., BellSouth Products, Inc., and Alabama Cellular Services, Inc., is (directly or indirectly) a wholly owned subsidiary of BellSouth Corporation. These filers' non-wholly owned operating subsidiaries are:

1155 Peachtree Associates
Infoventures
Infoventures of Atlanta
Beijing Ji Tong—BellSouth Communication & Information Engineering Co., Ltd.
BellSouth New Zealand
Compania de Radiocomunicaciones Moviles S.A.
Telcel Celular C.A.

Tele 2000, S.A.
BellSouth Wireless Data, L.P.
RAM Mobile Data Belgium, S.C.S.
RAM Mobile Data C.V.
BellSouth Carolinas PCS, L.P.
Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership
Decatur RSA Limited Partnership
Florida RSA #2B (Indian River) Limited Partnership
Georgia RSA No. 1 Limited Partnership
Georgia RSA No. 2 Limited Partnership
Georgia RSA No. 3 Limited Partnership
Gulf Coast Cellular Telephone Company
Jacksonville MSA Limited Partnership
Lafayette MSA Limited Partnership
Los Angeles Cellular Telephone Company
Louisiana RSA No. 7 Cellular General Partnership
Louisiana RSA No. 8 Limited Partnership
MCTA, Memphis SMSA Limited Partnership
Muncie Cellular Telephone Company, Inc.
Orlando SMSA Limited Partnership
Richmond Cellular Telephone Company
Tennessee RSA Limited Partnership
Terre-Haute Cellular Telephone Company, Inc.

CSX Transportation, Inc., is a wholly owned subsidiary of CSX Corporation. Seaboard Coastline Railroad Company, Louisville & Nashville Railroad Company, and Seaboard System Railroad, Inc., are each predecessors of CSX Transportation, Inc. CSX Transportation, Inc.'s non-wholly owned subsidiaries are:

Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company

Chatham Terminal Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Distribution Services, Inc.
Energy Dominion
Gemetal Distribution Services, Inc.
Georgetown Potomac Company
Harbour Associates
Helm-Atlantic Associates, L.P.
High Point, Thomasville & Denton Railroad Company
Home Avenue Railroad Company
Independent Rail Services, Inc.
Indiana Rail Road Company
Lakefront Dock and Railroad Terminal Company
Mahoning State Line Railroad Company
Midland United Corporation
North Charleston Terminal Company
One James Center Associates
Richmond Center Associates
Richmond Center Associates II
Savannah Harbor Resort Developers, LLC
Savannah Harbor Venture Partners, LLC
SHRD, Inc.
Unified Services, Inc.
Washington Harbour Associates Limited Partnership
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Alabama's corporate franchise tax discriminates against out-of-state corporations, both facially and as applied. The State taxes Alabama corporations based solely on the par or stated value of their stock—an amount that state law permits a corporation to set as low as it chooses. Alabama corporations can therefore diminish their franchise tax liability simply by reducing the par or stated value of their stock to a token amount. By contrast, the State taxes out-of-state corporations based on the value of essentially all their capital employed in Alabama—an amount that a corporation cannot manipulate through an artificial adjustment to the par or stated value of its stock. This disparate treatment of in-state and out-of-state corporations has a predictable result: Alabama corporations pay less than one-fifth of the franchise tax they would pay if they were out-of-state corporations.

Petitioners (all of whom are incorporated outside of Alabama) challenged the State's franchise tax on the ground that it discriminates against interstate commerce in violation of the Commerce Clause. The Alabama trial court, though expressly acknowledging that the tax is unlawfully discriminatory under this Court's Commerce Clause precedents, nevertheless denied relief. Invoking principles of "res judicata," the court ruled that petitioners' challenge was barred by a 1989 judgment upholding the franchise tax, even though petitioners were complete strangers to the prior litigation. On appeal, the Supreme Court of Alabama—in a five-to-four decision, and over a vigorous dissent—affirmed without opinion.

The Alabama Supreme Court's decision is incompatible with this Court's controlling constitutional rulings. First, there can be no doubt, particularly after this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), that Alabama's discriminatory franchise tax violates the Commerce Clause. Indeed, not a single one of the ten state-court judges involved in this case was willing to express a contrary view. Second, just two Terms ago, in another state tax case from Alabama, this Court ruled that the Alabama Supreme Court could not, consistent with the Due Process Clause of the Fourteenth Amendment, "bind a litigant to a prior judgment to which he was not a party." *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996). That rule "clearly applies," the Court held, "when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution." *Id.*

The Alabama Supreme Court, in default of its constitutional responsibility, simply defied these controlling decisions. Review by this Court is therefore necessary both to enforce the State's obligations under the Supremacy Clause and to vindicate petitioners' clearly applicable rights under the Commerce Clause and the Due Process Clause. Review is all the more appropriate here because

this Court, in exercising its certiorari jurisdiction, has long recognized that it has a special role in assuring allegiance to Commerce Clause principles and in guarding against efforts (like those indulged in here) to place artificial roadblocks in the way of meritorious challenges to state taxation schemes.

OPINIONS BELOW

The order and accompanying opinions of the Supreme Court of Alabama (Pet. App. 1a-14a) have not yet been reported. The opinion of the Fifteenth Judicial Circuit Court of Montgomery County, Alabama (*id.* at 15a-22a) is unreported.

JURISDICTION

The Supreme Court of Alabama entered its judgment on March 20, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Relevant portions of Alabama statutes, regulations, and rules are set forth at Pet. App. 76a-110a.

STATEMENT

1. The Tax at Issue.

Alabama imposes a franchise tax on both domestic and foreign corporations. A domestic corporation (*i.e.*, a corporation organized under the laws of Alabama) must pay

a tax "based on its capital stock" at the rate of $10 per $1,000. Ala. Code § 40-14-40.[1] Although the statute does not define "capital stock," Alabama has long applied the term to mean par value (in the case of stock with par value) or stated value (in the case of stock with no par value). *See* Stipulated Facts (hereinafter "Stip.") ¶¶ 9, 17, 56 (Pet. App. 50a, 52a, 61a).

The par or stated value of a domestic corporation's stock is determined by the corporation itself and does not represent the stock's market or book value. *See* Stip. ¶¶ 19-24 (Pet. App. 52a-53a). As the parties accordingly stipulated, an Alabama corporation "may control the amount of its domestic franchise tax . . . by assigning as the 'par value' or 'stated value' of its capital stock any value selected by it." Stip. ¶ 21 (Pet. App. 52a). Consequently, domestic corporations can (and do) minimize their franchise tax liability by assigning to their stock only a token par or stated value (for example, one cent per share). *See* Stip. ¶¶ 21-24 (Pet. App. 52a-53a); Statement of the Facts (hereinafter "Statement") 17 & n.20, 38 (Pet. App. 30a, 46a-47a).[2]

A foreign corporation's franchise tax liability is computed on a wholly different basis. It must pay a franchise tax at the rate of $3 per $1,000 of "the actual amount of [the corporation's] capital employed in this state." *See* Ala. Code § 40-14-41(a).[3] The statute defines a foreign

[1] Prior to 1984, the rate was $3 per $1,000. *See* Pet. App. 24a n.13, 27a. The years at issue in this case include 1982 through 1991.

[2] The "Statement of the Facts" is a portion of petitioners' pretrial brief that the trial court adopted in full as its own. *See* Pet. App. 21a n.7.

[3] A corporation's capital "employed in" Alabama consists of an apportioned share of its total capital, as determined by the percentage of the corporation's total property, payroll, and sales attributable to Alabama. *See generally* Ala. Code § 40-14-41(c); Ala. Franchise Tax Reg. § 810-2-3-.11 (repealed in 1992 and replaced by comparable provisions in Ala. Franchise Tax Reg. § 810-2-3-.13 (1993)).

corporation's "capital" to comprise essentially every item on the capital account of the corporation's balance sheet, "including the outstanding capital stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation." Stip. ¶ 18 (Pet. App. 52a); *see* Ala. Code § 40-14-41(b)(1)-(5). A foreign corporation, unlike a domestic corporation, thus cannot exert control over its own franchise tax liability by adjusting the par or stated value of its stock. *See* Stip. ¶¶ 25-26 (Pet. App. 53a).

In sum, despite a nominally higher franchise tax rate for domestic than for foreign corporations ($10 per $1,000 of "capital stock" vs. $3 per $1,000 of "capital employed" in Alabama), and despite the inability of domestic corporations to apportion their tax base (the tax applies to the company's stock regardless of where it does business), Alabama empowers domestic corporations (but not foreign corporations) to reduce their franchise tax burden to a bare minimum simply by adjusting the par or stated value of their stock. The demonstrable result, as explained below, is that foreign corporations bear a vastly disproportionate franchise tax burden solely because they are organized under the laws of States other than Alabama.

2. The Reynolds Litigation.

In 1986, Reynolds Metals Company and General Motors Corporation brought suit in Alabama trial court, claiming that the foreign franchise tax described above violated (among other things) the Commerce and Equal Protection Clauses. Reynolds and GM argued that, because of the different tax bases used in Sections 40-14-40 and 40-14-41, Alabama's foreign franchise tax scheme discriminated against out-of-state corporations. Proceeding on summary judgment and without a fully developed record, Reynolds and GM supported their discrimination claim by pointing to evidence that the average out-of-state

corporation paid significantly more franchise tax than the average Alabama corporation.

In ruling on this motion, the trial court agreed that Sections 40-14-40 and 40-14-41 discriminated against out-of-state corporations. Noting that, in 1982 and 1983, Alabama had collected almost $94 million from 29,000 out-of-state corporations but less than $10 million from 82,000 Alabama corporations, the trial court granted summary judgment for the plaintiffs on the ground that the foreign franchise tax violated the Equal Protection Clause. *See Reynolds Metals Co. v. White*, No. CV-86-1093, slip op. at 3 (Montgomery County Cir. Ct. July 7, 1989).[4] The Alabama Court of Civil Appeals affirmed on all grounds. *See White v. Reynolds Metals Co.*, 558 So.2d 367 (Ala. Civ. App. 1989).

Just seven days after the Court of Civil Appeals rendered its decision, however, the Alabama Supreme Court, acting *sua sponte*, issued a writ of certiorari, ordered the parties to file briefs within three days, and scheduled oral argument on the third day after that. Ten days after oral argument, the court issued a decision reversing the judgment of the Court of Civil Appeals and upholding the franchise tax in all respects. *See White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990).

In rejecting both the Commerce Clause and Equal Protection Clause attacks on the franchise tax, the Ala-

[4] In light of its equal-protection holding, the court found it unnecessary to address the *Reynolds* plaintiffs' Commerce Clause claims. In a separate order, the trial court determined that, pursuant to state-law retroactivity principles, its equal-protection ruling should have prospective effect only. *See Reynolds Metals Co. v. White*, No. CV-86-1093, slip op. at 3 (Montgomery County Cir. Ct. Aug. 14, 1989). Thus, despite a clear statutory refund remedy, *see* Ala. Code §§ 40-1-11, 40-1-12, 40-1-34, 40-2-22 (repealed in 1992 and replaced by comparable provisions in Ala. Code §§ 40-2A-1, *et seq.*), the court held that the *Reynolds* plaintiffs were not entitled to a refund.

bama Supreme Court proceeded on the premise that "the ultimate question in applying either equal protection or commerce clause analysis to these facts is virtually the same." *Id.* at 382. That question, as the court saw it, was "whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations." *Id.* (emphasis in original). "[I]n enacting tax statutes," the court stated, "legislatures are not required to reach equality with mathematical precision." *Id.* Applying these standards, the court pointed to considerations that, in its view, reduced "the alleged unequal treatment of and discrimination against foreign corporations . . . to a point that no discrimination of constitutional significance exists." *Id.* at 388.

First, the court said that the plaintiffs had failed to make a sufficient showing of discrimination to support their motion for summary judgment—or, indeed, to withstand the State's cross-motion for summary judgment. In the court's view, plaintiffs' summary showing that foreign corporations on average paid more franchise tax than domestic corporations did not necessarily prove discrimination. The higher tax burden of foreign corporations would not be discriminatory at all, the court said, if foreign corporations were actually employing more capital in Alabama than were domestic corporations, a question that could not be answered on the record before it. *See id.* at 383.

Second, the court determined that Alabama's foreign franchise tax was "complementary" to Alabama's "domestic shares tax" (Ala. Code § 40-14-70)—an unrelated ad valorem property tax imposed on shareholders of domestic corporations and, in practice, typically paid by corporations on behalf of the shareholders (*see id.* §§ 40-14-70(c), 40-14-73). *See* 558 So.2d at 383. Adding the domestic shares tax to the domestic franchise tax, the

court stated, made the relative tax burdens on domestic corporations "more nearly equivalent to that of foreign corporations." *Id.* at 386. The court failed to mention that Alabama law also imposes a shares tax on Alabama residents owning stock in foreign corporations. *See* Ala. Code § 40-11-1(b)(9).

In reaching its conclusions, the Alabama Supreme Court did not have the benefit of this Court's subsequent pronouncement rejecting "a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 n.3 (1996), or of its recent decisions narrowly circumscribing the scope of the "complementary tax doctrine." *See id.* at 333-44; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994).[5]

3. The Proceedings Below.

a. Trial court. While the *Reynolds* case was pending before the Alabama Supreme Court, petitioner South Central Bell Telephone Company (which later merged into BellSouth Telecommunications, Inc.) brought this action challenging Alabama's foreign franchise tax in the Circuit Court for Montgomery County. Certain of South Central Bell's affiliates thereafter filed similar suits. One year later, petitioner CSX Transportation, Inc., and certain of its predecessors also separately brought actions challenging the franchise tax in the same court. The trial court consolidated all the BellSouth and CSX actions, which, in the aggregate, sought declaratory relief and refunds with respect to tax years 1982 through 1991. After extensive discovery, the court conducted a two-day bench trial in December 1994.

[5] Perhaps because of the Alabama Supreme Court's finding that the factual record did not bear out discrimination, this Court denied petitions for certiorari filed by Reynolds Metals and GM. *See* 496 U.S. 912 (1990).

At trial, the BellSouth and CSX taxpayers sought to remedy the evidentiary deficiencies on which the Alabama Supreme Court had relied in *Reynolds*—a case that had been decided on a summary judgment record in which the plaintiffs had sought to prove discrimination by showing that, on average, foreign corporations paid more franchise taxes than did domestic corporations. *First*, BellSouth and CSX introduced an expert study and supporting testimony that compared the franchise tax that domestic corporations actually paid with the franchise tax they *would have* paid if they had been foreign corporations. *See* Statement 23-24, 29 (Pet. App. 35a-36a, 40a). The evidence showed that, on average, the domestic corporations, if treated as foreign corporations, would have paid franchise taxes in an amount more than five times greater than the amount they actually paid. *See id.* at 24 (Pet. App. 36a) (percentage of discrimination ranging from 409.56% in 1988 to 509.15% in 1991).[6]

Second, petitioners introduced evidence to address the *Reynolds* court's holding that the foreign franchise tax should be treated as "complementary" to the domestic shares tax. Petitioners argued that, as a matter of law, a different and unrelated tax like the shares tax could not remedy unconstitutional discrimination. But they also showed that it should not matter: their evidence demonstrated that, on average, the sampled domestic corporations, if treated as foreign corporations, would have paid franchise taxes in an amount roughly twice as great as the combined amounts of franchise taxes and domestic shares taxes they actually paid. *See id.* at 25 (Pet. App. 36a-37a) (percentage of discrimination ranging from 109% in 1988 to 104% in 1991).

[6] The evidence of discrimination was based on data for tax years 1988 through 1991. The parties stipulated that evidence for the tax years 1988 through 1991 is representative of the other tax years at issue (1982-87). *See* Stip. ¶ 66 (Pet. App. 62a).

The Circuit Court agreed that petitioners had accomplished their objective of filling any evidentiary gaps in the *Reynolds* record: "The Court finds that the Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Pet. App. 21a-22a (footnote omitted).[7] The court also agreed with petitioners' legal arguments that this Court's recent decisions had thoroughly undermined the Alabama Supreme Court's reasoning in *Reynolds* by confirming both that there is no "de minimis" exception to the Commerce Clause's ban on discrimination against interstate commerce and that discrimination caused by one state tax (like Alabama's franchise tax) cannot be offset by an unrelated state tax (like the domestic shares tax):

> [T]he Court believes that since 1989, the United States Supreme Court has made it abundantly clear that a state's tax scheme cannot impose the slightest burden on interstate commerce unless there is some reason for doing so other than economic protectionism. *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. [93], 114 S. Ct. 1395 (1994); *Associated Industries v. Lohman*, 511 U.S. [641], [114] S. Ct. [1815] (1994). In addition, the decision in *Fulton Corporation v. Faulkner*, [516] U.S. [325], 133 L.Ed.2d 796 (1996), enlightens the analysis of the complementary tax doctrine and appears to super[s]ede the reasoning of the *Reynolds* court.

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[7] The omitted footnote states: "See Taxpayers' brief filed May 17, 1994, pp. 10-39, which the Court finds to fairly state the evidence in this case and, except as otherwise indicated, the Court adopts as its own." Pet. App. 21a n.7. The portion of petitioners' trial court brief that the court adopted as its own is the "Statement of the Facts" reproduced at Pet. App. 23a-47a.

Id. at 21a. The court therefore concluded "that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution." *Id.* at 22a.

Despite that Commerce Clause ruling, the Circuit Court entered judgment against petitioners. The court said in a single unexplained sentence—for which it cited no authority—that, "based upon Alabama jurisprudence, the Taxpayer's claims are barred by *res judicata*." *Id.* at 17a. The court so held even though none of the taxpayers was a party to the *Reynolds* litigation; none had an opportunity to present evidence or argument in the *Reynolds* litigation; none was in any way affiliated with the *Reynolds* plaintiffs; none had authorized them to represent its interests; none in any way controlled the prosecution of the *Reynolds* case or shared in the plaintiffs' legal expenses; and, indeed, none was even *aware* of the *Reynolds* litigation until after the trial court's decision in that case. *See* Tr. 131-32, 192-93 (Pet. App. 69a-70a, 73a-74a).

Having concluded that the taxpayers' claims were barred by state-law res judicata principles, the Circuit Court turned to the question whether denying the taxpayers their day in court would violate their federal due process rights. The court acknowledged that, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court had recently invalidated a similar application of res judicata by the Alabama Supreme Court. In *Richards*, the Alabama Supreme Court had held that a decision in a prior action brought by one set of taxpayers barred an action by a second, unrelated set of taxpayers on the theory that the first set of taxpayers "adequately represented" the second, *id.* at 796; this Court reversed the Alabama Supreme Court's decision as an "extreme application of state-law res judicata principles" violative of due process, *id.* at 804. But the Circuit Court held that *Richards* was distinguishable on two grounds.

First, the court believed that petitioners here, unlike the petitioners in *Richards*, had "notice" of the prior

litigation. Pet. App. 19a. The court used the term "notice," however, in a decidedly unorthodox manner—*not* to signify notice to non-parties that their rights might be adjudicated preclusively in pending litigation, but rather to signify merely a general *awareness* of the pending litigation. Relying first on a theory of imputed knowledge, the court stated that, because petitioners are "large and sophisticated corporations," it was reasonable to assume that they "are well informed in all matters involving issues of national and state taxation, and that they stay well informed of significant pending legal actions and court decisions." *Id.* at 18a. In addition, according to the court, petitioners "admit[ted]" that, by the time they brought suit in this case, they had become aware of the trial court's decision in *Reynolds* and, in that sense, had acquired "actual notice" of that litigation. *See id.* at 18a-19a. The court did not explain the basis for its tacit conclusion that "notice"—in the sense of imputed or actual awareness of pending litigation involving unrelated parties—could by itself support the application of res judicata.

Second, the Circuit Court apparently thought that it was more reasonable here than it had been in *Richards* to conclude that the unrelated taxpayers in the earlier case adequately represented taxpayers in the later case. In support, the court noted that the "*Reynolds* taxpayers were represented by well known and excellent counsel"; that, even though "all of the precise arguments may not have been made in *Reynolds* that are presented to this Court, the *Reynolds* action and this action arise out of the same nucleus of operative facts"; that the taxpayers' basic Commerce Clause claim was "addressed and decided in *Reynolds*"; that "[t]here was not a significant lapse of time between the *Reynolds* litigation and these . . . actions"; that "[t]here is no conflict between the interests of the *Reynolds* taxpayers and the Taxpayers in this

action"; and that petitioners were "represented by the same attorney." *Id.* at 19a.[8]

b. Alabama Supreme Court. In their appeal to the Alabama Supreme Court, petitioners challenged the Circuit Court's res judicata determination and, among other things, reiterated their Commerce Clause objections to the franchise tax. Nearly a year later, the Alabama Supreme Court, in a five-to-four decision, issued the following order:

> PER CURIAM.
>
> AFFIRMED. NO OPINION.
>
> See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P., and *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), cert. denied, *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

Pet. App. 1a.[9]

One member of the majority (Justice Maddox) did attempt "to explain why" the trial court's decision should be affirmed. *Id.* In Justice Maddox's view, the critical fact was a letter that counsel for the BellSouth taxpayers

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[8] The court was apparently referring to the fact that Professor Walter Hellerstein, co-counsel to petitioners in this case, also represented the *Reynolds* plaintiffs. The court failed to say that Professor Hellerstein represented the *Reynolds* plaintiffs only in seeking review in this Court, not in any state-court proceedings. The court also did not explain how Professor Hellerstein could possibly have protected petitioners' interests in the *Reynolds* litigation, particularly when Professor Hellerstein did not even become involved in the *Reynolds* litigation until after the evidentiary failure that the Alabama Supreme Court saw in *Reynolds* had already occurred.

[9] Rule 53(a) of the Alabama Rules of Appellate Procedure provides in pertinent part: "The Supreme Court . . . may affirm a judgment or order of a trial court without an opinion if the court determines: (1) That an opinion in the case would serve no significant precedential purpose; and (2) That . . . (F) [t]he court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." Pet. App. 108a.

sent to the Circuit Court in January 1990 (after the Alabama Supreme Court had issued its decision in *Reynolds*) requesting that the court hold the case in abeyance pending final disposition of the *Reynolds* litigation. *See id.* at 3a-4a. The letter stated:

> [B]oth the taxpayer and the State Department of Revenue desire that further proceedings with regard to this appeal be held in abeyance pending a final disposition of the *Reynolds* and [*GM*] cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U.S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated.

Id. at 65a.

Justice Maddox interpreted this routine abeyance request to mean "that both parties advised [the trial court] that they were going to be bound by the final decision in the *Reynolds Metals* case," *id.* at 4a; he therefore concluded that "the trial court did not err in holding that the decision in *Reynolds Metals* precluded the claims of these particular taxpayers," *id.* at 6a. Justice Maddox gave no reason for inferring that a litigant waives the right to pursue its own case when it asks a court to hold its case in abeyance pending the disposition of another case. Nor did Justice Maddox explain how the BellSouth taxpayers' action could bind the CSX taxpayers, who did not even file their lawsuits until a year after counsel for the BellSouth taxpayers wrote the letter in question. As for this Court's decision in *Richards*, Justice Maddox summarily dismissed it, observing without elaboration that "[t]he operative facts of this case relating to the Due Process Clause argument are . . . wholly different." *Id.*

Three of the four dissenting Justices joined an opinion by Justice See concluding that "the taxpayers' claims are not barred by the doctrine of res judicata." *Id.* at 7a.[10]

[10] Justice Cook dissented without opinion.

The dissent observed that the doctrine simply does not apply where, as here, "we are dealing not only with different tax years, but also with different taxpayers." *Id.* at 8a. The dissent further noted that "the doctrine of res judicata does not apply when the judgment pleaded as an estoppel is based upon controlling decisions subsequently repudiated by supervening decisions." *Id.* That principle was applicable here, the dissent explained, because this Court "has rendered intervening decisions that repudiate the *Reynolds Metals* rationale." *Id.*

On the merits, the dissent found it "inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make of this nation a single market." *Id.* at 7a. The dissent noted that the domestic franchise tax applies only "to the easily manipulable base of par value," whereas the foreign franchise tax applies "to the much larger base of par value plus other items such as surplus and long-term debt." *Id.* at 12a-13a. Because "[i]t is not facially apparent" that the much greater foreign tax base "merely equalizes the burden produced by the application of" the higher tax rate applicable to domestic corporations (1% vs. 0.3%), the dissent found that "the Alabama franchise tax facially discriminates against interstate commerce." *Id.* Recognizing that this Court has rejected a "de minimis" exception to Commerce Clause principles, the dissent added that "arguments over the degree of the discrimination do not affect this characterization." *Id.* at 13a.

The dissent was also unpersuaded by the State's defense that the discriminatory foreign franchise tax could be justified as a "compensatory tax" for other levies imposed on domestic corporations. Though recognizing that the Alabama Supreme Court had "accepted a similar argument in *Reynolds Metals*," *id.*, the dissent observed that this Court "has since clarified and narrowed the definition of compensatory tax," *id.* (citing *Fulton Corp.*

v. Faulkner, 516 U.S. 325, 332-33 (1996), and *Oregon Waste Sys., Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 102 (1994)).

In particular, the dissent concluded that Alabama's franchise tax failed two of this Court's criteria for a permissible "compensatory tax." First, the dissent stated, the State had failed to demonstrate that the "discriminatory interstate tax . . . . roughly approximates, but does not exceed," the taxes on intrastate commerce for which it allegedly compensates. *Id.* at 13a-14a. To the contrary, the dissent noted, "the Taxpayers offer substantial evidence supporting the proposition that the foreign franchise tax exceeds any intrastate burden." *Id.* at 14a. Second, the dissent concluded that "[t]he State also fail[ed] to show that the events taxed by Alabama's intrastate taxes and the interstate tax are 'substantially equivalent.'" *Id.* (citing *Fulton*, 516 U.S. at 333, 336-38). In contrast to sales and use taxes, which are complementary because they are functionally equivalent to one another, the foreign franchise tax (a tax on the corporation's privilege of doing business) and the domestic shares tax (a tax on shareholders' property) "cannot be viewed as 'mutually exclusive proxies' for each other." *Id.* (citing *Fulton*, 516 U.S. at 333, 338-40).

REASONS FOR GRANTING THE PETITION

In the words of the dissenting Justices below, "it is inescapable" that Alabama's foreign franchise tax violates the Commerce Clause. This Court's decisions in *Fulton*, *Associated Industries*, and *Oregon Waste* make utterly clear (if there ever was doubt) that the grounds on which the Alabama Supreme Court based its 1989 *Reynolds* decision—that de minimis discrimination is not unlawful and that Alabama's foreign franchise tax is a permissible "complementary tax"—can no longer pass legal muster. Yet, Alabama to this day continues to levy and collect its foreign franchise tax—even though every judge who

expressly addressed the question in this case concluded that the tax is plainly unconstitutional.

The decision below makes clear that the Alabama Supreme Court is simply unwilling to apply this Court's constitutional rulings and to rectify the unlawful state of affairs. Perhaps tacitly acknowledging that nothing can be said in defense of the tax's constitutionality, the court rejected petitioners' Commerce Clause challenges in a no-opinion affirmance. That the affirmance may actually rest on a res judicata rather than a Commerce Clause holding[11] makes the Alabama Supreme Court's intransigence, if anything, all the more troublesome: any such holding must be viewed as an "extreme applicatio[n] of the doctrine of res judicata" that itself flies in the face of this Court's recent due process precedent. *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996). Either way, the decision below squarely "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Review is required to bring this recalcitrance to an end.

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[11] The decision below seems open to different readings. The court's "no opinion" affirmance cited Rule 53(a)(1) and (2)(F) of the Alabama Rules of Appellate Procedure, as well as the *Reynolds* decision. On the one hand, the court may have reached the merits of petitioners' Commerce Clause claims, may have believed that *Reynolds* (cited only as precedent) was somehow still good law, and may therefore have concluded (in the words of Rule 53(a)(2)(F)) that the trial court's "judgment" (in the sense of its result) had been "entered without an error of law." On the other hand, the Alabama Supreme Court's affirmance may reflect a res judicata holding. For one thing, if it had reached the merits, one might have expected the court not to remain silent in the face of a trial court opinion explicitly stating that the franchise tax failed Commerce Clause review. For another thing, Justice Maddox (whose fifth vote was necessary to make a majority) based his separate opinion on res judicata and expressly stated that he did not reach the merits of petitioners' Commerce Clause claims. *See* Pet. App. 6a. Because it is impossible to determine with certainty whether the no-opinion affirmance was based on the merits of petitioners' claims, on res judicata, or on both, this petition challenges both grounds.

These "compelling reasons" for granting this petition (Sup. Ct. R. 10) are all the more cogent given the nature of the underlying dispute. Because "the Commerce Clause's overriding requirement of a national 'common market'" (*Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)) historically has required federal judicial protection, and because the Tax Injunction Act (28 U.S.C. § 1341) forecloses access to the lower federal courts to challenge the lawfulness of state taxes, this Court has long exercised its discretionary certiorari jurisdiction mindful of its role as "the special guardian of the Commerce Clause," *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 101 n.3 (1948) (Frankfurter, J., dissenting).

More generally, this Court has been vigilant to ensure that States do not place artificial obstacles in the path of taxpayers seeking to recover, through established procedures, state taxes levied in violation of federal law. This Court has ruled, for example, that state courts may not deny relief from unlawful state tax schemes on the ground that the constitutional decisions of this Court, though applied to the parties before this Court, may nonetheless be given only prospective effect in the state courts. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Similarly, this Court has prevented state courts from denying a meaningful post-deprivation remedy to taxpayers who paid an unconstitutional state tax under legal compulsion. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). And the Court has foreclosed "bait and switch" tactics, under which States, having held out an established post-deprivation refund remedy for unlawfully imposed taxes, declared only after the disputed taxes were paid that no such remedy is available. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106 (1994).

Here, Alabama, unable to erect an obstacle of plausible legality, appears to have devised a hurdle that this Court—in a unanimous, recent, and unambiguous decision—has already prohibited this very State from using. Given the Alabama court's unwillingness to accede to that ruling, this Court should now grant review to determine (a) that the Alabama Supreme Court cannot constitutionally deprive petitioners of their day in court on the basis of extreme state-law res judicata principles, (b) that Alabama's facially discriminatory franchise tax scheme violates the Commerce Clause, and (c) that petitioners are entitled to meaningful backward-looking relief from the unlawfully exacted franchise taxes.[12]

I. DUE PROCESS DOES NOT PERMIT AN EXTREME APPLICATION OF RES JUDICATA TO BLOCK A CHALLENGE TO A PATENTLY UNCONSTITUTIONAL STATE TAX.

To the extent that the Alabama Supreme Court rested its no-opinion affirmance on state-law principles of res judicata, it has blocked petitioners' challenges to Alabama's patently unconstitutional franchise tax by throwing in peti-

[12] Under the circumstances, "summary disposition on the merits" pursuant to Rule 16.1 may be appropriate. *See, e.g., Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam) (summarily vacating Florida decision in which state court had denied tax refund relief using the same "bait and switch" approach previously condemned in *Reich v. Collins*, 513 U.S. 106 (1994)). This is so because the decision below "is clearly erroneous under [this Court's] precedents," *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1868 (1997) (per curiam); the error is "of constitutional dimension," R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 252 n.83 (7th ed. 1993); the error unquestionably "has led to an incorrect result," *Torres-Valencia v. United States*, 464 U.S. 44, 44 (1983) (Rehnquist, J., dissenting); "the facts are not in dispute," *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); and there is no need to fear showing disrespect to a "carefully reasoned decision," *Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 947 (1977) (Stevens, J., dissenting).

tioners' way a procedural obstacle that *itself* directly conflicts with this Court's recent and unambiguous precedent. In *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court just two Terms ago unanimously rebuffed an attempt by the same Alabama Supreme Court to interpose an equally far-fetched res-judicata bar to a lawsuit challenging a different Alabama tax as violative of the federal constitution. This case is indistinguishable from *Richards*. It, too, represents an impermissible infraction of "the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." *Id.* at 804.

1. In *Richards*, the Alabama Supreme Court had held that a suit challenging an Alabama tax under the Due Process and Equal Protection Clauses of the Fourteenth Amendment was barred by res judicata in light of an earlier decision, *Bedingfield v. Jefferson County*, 527 So.2d 1270 (1988), in which that court had rejected a similar challenge to the same tax brought by different parties. Even though the *Richards* plaintiffs had not been parties to the *Bedingfield* litigation, the Alabama Supreme Court held that they were bound by that decision. According to the Alabama Supreme Court, "the taxpayers in *Bedingfield* adequately represented [the taxpayers in *Richards*] because their respective interests were essentially identical." 517 U.S. at 796 (internal quotation marks omitted).

This Court held that setting up *Bedingfield* as a bar denied the *Richards* plaintiffs their rights under the federal due process guarantee. *See id.* at 797. At the outset, the Court reiterated the bedrock principle that the Due Process Clause generally permits state courts to hold a litigant bound by an earlier decision only if that litigant was a party to the earlier case. *See id.* at 797-98; *see also Hansberry v. Lee*, 311 U.S. 32, 40 (1940). The Court acknowledged that the rule may be different where, for example, there is a guardian-ward or trustee-beneficiary relationship, there is a "class or representative sui[t]," or

there is "a special remedial scheme . . . as for example in bankruptcy or probate." 517 U.S. at 798-99 (internal quotation marks omitted). But no such exception applied in *Richards*.

And the Court rejected Alabama's argument that litigants may be bound whenever they were "adequately represented" in earlier litigation. *Id.* at 799-802. At the outset, the Court called "troubling" the fact that the *Richards* plaintiffs had not been provided with "any notice that a suit was pending which would conclusively resolve their legal rights." *Id.* at 799. Moreover, the Court said, even assuming that "adequate representation" could ever "cure a lack of notice," the prior proceeding would "at least have to be so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 801 (internal quotation marks omitted).

The *Bedingfield* proceeding, the Court held, simply did not answer that description. The Court noted that the *Bedingfield* plaintiffs "did not sue on behalf of a class," that "their pleadings did not purport to assert any claim against or on behalf of any nonparties," and that "the judgment they received did not purport to bind any county taxpayers who were nonparties." *Id.* Thus, the Court applied "the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." *Id.* at 804. The Court concluded that "[a] state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party," and that this "general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution." *Id.* at 805.

2. The Alabama Supreme Court's decision in the present case is at least as "extreme [an] application of state-

law res judicata principles" as the Alabama Supreme Court decision reviewed in *Richards*, and it equally "violates the Federal Constitution." *Id.* at 804. As in *Richards*, none of the petitioners here was given notice that the *Reynolds* litigation "would conclusively resolve their legal rights." *Id.* at 799. Similarly, the *Reynolds* proceeding was not "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 801 (internal quotation marks omitted). Moreover, as in *Richards*, the *Reynolds* plaintiffs "did not sue on behalf of a class" or "purport to assert any claim . . . on behalf of any nonparties," and the *Reynolds* judgment "did not purport to bind any . . . nonparties." *Id.*

The attempts by Justice Maddox and the trial court to distinguish *Richards* are without substance. Contrary to Justice Maddox's assertion, the letter in which the BellSouth taxpayers (joined by the State Department of Revenue) asked the trial court to hold the litigation in abeyance in no way suggests that the BellSouth taxpayers ever agreed, either expressly or by implication, to be bound by the *Reynolds* decision. Instead, the letter (reprinted in full at Pet. App. 65a-66a) was a routine effort to conserve the resources of the trial court and the parties: if this Court had granted review in *Reynolds* and had invalidated the tax on the slender record developed in that case, it would have been unnecessary for the BellSouth taxpayers to develop the full record eventually assembled in this case. And it is simply a mystery how BellSouth's innocuous abeyance request can possibly be understood, under any coherent theory, to foreclose the CSX taxpayers, who did not even *file* their actions until nearly a year later.

Quite apart from the fact that nothing in the letter can plausibly be read to manifest any intention to bind the taxpayers to *Reynolds*, it is utterly unrealistic to attribute

such an intention to petitioners. It would be odd enough for petitioners voluntarily to bind themselves to the outcome of litigation to which they were not a party, waiving any opportunity to cure defects in the *Reynolds* record without any offsetting benefit. But the timing of the abeyance request would make this odder still. The BellSouth taxpayers sent the abeyance letter *after* the Alabama Supreme Court had already rejected the *Reynolds* plaintiffs' challenges. It is inconceivable that petitioners would willingly have tied their fate to that of litigants who had already suffered a loss at the highest level of the Alabama court system.

The trial court's "distinctions" (not endorsed even by Justice Maddox) are equally insubstantial. As for the trial court's "notice" point, the undisputed record evidence shows that petitioners did not become aware of the *Reynolds* litigation until after the trial court's decision in that case. *See supra*, p. 11.[13] And it is neither realistic nor constitutionally tolerable to impute knowledge to petitioners merely because they are "large and sophisticated corporations." Pet. App. 18a. In any event, mere "knowledge" of a case cannot be equated with "notice that a suit was pending which would conclusively resolve [petitioners'] legal rights." 517 U.S. at 799. As this Court stated in *Richards*, "[t]he general rule is that the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Id.* at 800 n.5 (internal quotation marks and brackets omitted).

The trial court also suggested that the *Reynolds* plaintiffs "adequately represented" petitioners, noting that accomplished attorneys represented the *Reynolds* plaintiffs;

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[13] Binding petitioners to the outcome in the *Reynolds* case is thus particularly offensive. The Alabama Supreme Court based its rejection of the *Reynolds* plaintiffs' claims on evidentiary failure. By the time petitioners learned of the *Reynolds* litigation, that failure had already occurred.

that *Reynolds* arose from the "same nucleus of operative facts"; that petitioners' basic claim was "addressed and decided in *Reynolds*"; that there was no "significant lapse of time" since *Reynolds;* that the *Reynolds* plaintiffs had no "conflict of interest" with petitioners; and that the same attorney who represented the *Reynolds* plaintiffs also represented petitioners. With the possible exception of the overlap of attorneys, however, each of these considerations applied equally in the *Richards* case. And to say that "[t]axpayers are represented by the same attorney" as the *Reynolds* plaintiffs significantly overstates the case: Professor Hellerstein (one of petitioners' counsel) represented the *Reynolds* plaintiffs only as co-counsel in seeking certiorari in this Court. *See* note 8, *supra.* In any event, overlap of attorneys is both legally and logically irrelevant.[14]

II. ALABAMA'S TAX PLAINLY VIOLATES THE COMMERCE CLAUSE.

Nor can there be any serious debate about the proper resolution of the merits of this case: Alabama's franchise tax unquestionably discriminates against interstate commerce in violation of the Commerce Clause. Every judge who expressly addressed the question in this case so concluded. The trial judge found that the tax violated the Commerce Clause because "the Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Pet. App. 21a-22a (footnote omitted). The three Alabama Supreme Court Justices who joined an opinion on the merits likewise concluded that "it is inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make

[14] *See generally Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 178-79 (3d Cir. 1994) (Becker, J.) ("[t]he fact that the plaintiff's attorney took part in a prior, similar action is irrelevant unless there is evidence that the plaintiff was, through his or her attorney, actually participating in the prior suit").

of this nation a single market." *Id.* at 7a. And the deafening silence of the five Justices who voted to affirm may be the surest sign that Alabama's foreign franchise tax cannot be defended against Commerce Clause attack.

1. Alabama's franchise tax scheme produces a paradigmatic violation of the Commerce Clause by "favor[ing] domestic corporations over their foreign competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996). By imposing a tax on domestic corporations measured by the par or stated value of their capital stock, Alabama permits domestic corporations effectively to dictate their own franchise-tax liability, a freedom that those corporations naturally exploit to reduce their franchise tax payments to a minimal amount. *See* Stip. ¶¶ 21-24 (Pet. App. 52a-53a). In contrast, by imposing a tax on foreign corporations measured by actual capital employed in the State, Alabama precludes foreign corporations from doing the same. *See* Stip. ¶¶ 25-26 (Pet. App. 53a). Thus, the franchise tax statute facially discriminates against interstate commerce and thereby violates the "virtually *per se* rule of invalidity" that this Court applies to facially discriminatory taxes. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1598 (1997) (striking down state property-tax exemption for charitable institutions that was limited to institutions serving principally state residents); *Fulton*, 516 U.S. at 331 (invalidating property tax on "intangibles" that taxed corporate stock only to the extent that the issuing corporation engaged in out-of-state activity); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 100 (1994) (condemning tax on in-state disposal of out-of-state waste that was higher than tax on in-state disposal of in-state waste).

The discrimination that is plain on the face of Alabama's franchise tax statute is equally evident in its application. As the trial court found, domestic corporations

would have been saddled with a franchise tax burden more than five times greater than what they actually paid if they had been incorporated in any other State. *See* Pet. App. 36a; notes 2 & 7, *supra*. It follows that Alabama's franchise tax "in its practical operation work[s] discrimination against interstate commerce," *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940), and therefore violates the Commerce Clause prohibition against state taxes that have a "discriminatory effect," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

2. In light of the clear discrimination worked by Alabama's franchise tax (both by its terms and in effect), the only remaining question is whether the discriminatory levy may be rescued from constitutional attack on the theory—seized upon by the *Reynolds* court, *see* 558 So.2d at 386—that it is a so-called "complementary tax" needed to compensate for some burden imposed disproportionately on intrastate commerce. The answer to that question, under this Court's decisions, is by now entirely free from doubt: the complementary tax defense cannot save Alabama's discriminatory franchise tax from condemnation under the Commerce Clause.

In a series of decisions handed down after *Reynolds*, this Court has carefully delineated the scope of the complementary tax doctrine, articulating three requirements that must be met before a court may excuse otherwise unconstitutional discrimination: (1) the State must identify an intrastate tax burden for which the discriminatory tax attempts to compensate; (2) the tax on interstate commerce must roughly approximate—but not exceed—the amount of the tax on intrastate commerce; and (3) the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent," *i.e.*, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Oregon Waste*, 511 U.S.

at 103; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 648 (1994); *Fulton*, 516 U.S. at 332-33.

The State cannot tenably defend its franchise tax under this test: even assuming that the domestic shares tax could qualify as an intrastate tax burden for which the discriminatory franchise tax purports to compensate, the State cannot satisfy either of the latter two criteria. *First*, even if one takes account of the domestic shares tax, domestic corporations still pay in franchise tax and domestic shares tax combined only about half the amount they would pay in franchise tax alone if they were incorporated elsewhere. *See* Statement 25 (Pet. App. 36a-37a). The tax on interstate commerce therefore cannot "be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce." *Oregon Waste*, 511 U.S. at 103. Rather, as in *Associated Industries*, "[t]he resulting disparity is incompatible with what [this Court has] termed the 'strict rule of equality adopted in [*Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)].'" 511 U.S. at 649.

Second, the domestic shares tax and the franchise tax are not imposed on substantially equivalent events. The shares tax is an ad valorem personal property tax (much like a property tax on real estate), which taxes shareholders based on the value of their stock holdings. In contrast, the franchise tax is an excise tax, which taxes the corporation (not the shareholder) for the privilege of corporate existence or doing business. *Compare* Ala. Code § 40-14-70 *with* Ala. Code § 40-14-41. Alabama thus imposes the two levies not only on different events, but also on different taxpayers. Accordingly, the corporate franchise tax and the domestic shares tax cannot be viewed as complementary because the two taxes are not "sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Oregon Waste*, 511 U.S. at 103 (internal quotation marks and brackets omitted); *see also Fulton*, 516 U.S. at 340 n.6 ("incidence upon the same

class of taxpayers is a necessary condition for a finding that two taxes are compiementary").[15]

III. PETITIONERS ARE ENTITLED TO MEANINGFUL BACKWARD-LOOKING RELIEF.

Relying on *Reynolds*, the trial court also stated that, even if res judicata did not bar petitioners' Commerce Clause claims, "the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only," noting that "there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund." Pet. App. 22a. Because the Alabama Supreme Court wrote no opinion, it is unclear whether that court meant to endorse this statement. Although a retroactivity or remedy-related holding could not by itself account for the Alabama Supreme Court's result,[16] it is theoretically possible that the court's no-opinion affirmance reflected an alternative holding with respect to petitioners' refund claims. *See* note 11, *supra*.

If that was in fact the case, the Alabama Supreme Court unquestionably erred. It is now crystal clear that a decision announcing a rule of federal law ordinarily "must be given full retroactive effect by all courts adjudicating federal law," and that "[t]he Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retro-

[15] If the domestic shares tax is "complementary" to anything, it is to the foreign shares tax of Alabama Code § 40-11-1(b)(9). Like its domestic counterpart, the foreign shares tax is imposed on shareholders (not corporations), and is collected by county governments (not the State). *See generally* Statement 22 (Pet. App. 34a).

[16] The trial court's judgment, affirmed by the Alabama Supreme Court, dismissed petitioners' complaints outright. Those complaints had demanded not only retrospective refunds, but also prospective declaratory relief. Because the unavailability of backward-looking relief cannot have justified dismissal of petitioners' request for declaratory relief, the Alabama Supreme Court's affirmance cannot have rested solely on that unstated ground.

activity under state law." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96, 100 (1993). It is equally clear that where, as here, a State has long held out a statutory refund remedy,[17] the State may not engage in "bait and switch" tactics by holding in hindsight that a pre-deprivation remedy is a taxpayer's only available recourse for unlawful taxation. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106, 113-14 (1994). It follows that, because the Alabama franchise tax is plainly invalid under "established principles of Commerce Clause jurisprudence" (*McKesson*, 496 U.S. at 31 n.15), petitioners are indisputably entitled to a backward-looking remedy under Alabama's post-payment refund procedures.[18]

[17] *See* Ala. Code §§ 40-1-11, 40-1-12, 40-1-34, 40-2-22 (repealed in 1992 and replaced by comparable provisions in Ala. Code §§ 40-2A-1, *et seq.*).

[18] Although this Court may conclude that the question is best addressed in the first instance by the Alabama Supreme Court on remand, it would certainly not be inappropriate for this Court to reach the issue. This Court has sometimes remanded so that a state court could consider in the first instance whether a refund of unlawfully collected taxes was the appropriate post-deprivation remedy, *see, e.g., McKesson*, 496 U.S. at 39-41, 51-52; *Associated Indus.*, 511 U.S. at 656, but its decisions in *Newsweek* and *Reich* make clear that, on remand, there would be no tenable basis for the Alabama Supreme Court to deny petitioners refunds. As in *Newsweek* and *Reich*, therefore, the Court may properly dispose of the remedial question without a remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER HELLERSTEIN
University of Georgia
Law School
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

June 18, 1998

* Counsel of Record

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APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1997-98

1960591

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*

v.

STATE OF ALABAMA AND STATE DEPARTMENT OF REVENUE

Appeal from Montgomery Circuit Court
(CV-89-2600, 90-1591, 90-1711, 90-2555, 90-2556, 90-2557, 90-2558, 91-397, 91-1079, and 91-2151)

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P., and *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), cert. denied, *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

Hooper, C. J., and Almon, Shores, and Houston, JJ., concur.

Maddox, ., concurs specially.

Kennedy, Cook, Butts, and See, JJ., dissent.

MADDOX, JUSTICE (concurring specially).

Although I agree that the judgment of the trial court is due to be affirmed, I write separately to explain why I have reached that conclusion, especially in view of the arguments raised by the taxpayers.

This case originated as a challenge by South Central Bell Telephone Company ("Bell") of an assessment of franchise tax liability against it by the Alabama Department of Revenue. On December 15, 1989, Bell filed in the Montgomery County Circuit Court a notice of appeal and a complaint and petition for judicial review of the assessment. On November 29, 1990, Judge William R. Gordon ordered that the Bell case be consolidated with similar actions that had been filed recently by several of Bell's sister corporations.[1] Both before and after this consolidation, all the plaintiffs were represented by the same attorney.[2]

On December 13, 1990, CSX Transportation, Inc., filed several actions challenging assessments of franchise tax liability, on essentially the same grounds that had been raised by Bell. CSX was represented in each of those actions by the same attorney representing Bell and its sister corporations. On May 28, 1992, upon motion by all the plaintiffs, Judge Gordon ordered the consolidation of the Bell and CSX actions.

At the trial level, the State contended, as it does here, that Bell and CSX should be estopped from litigating this case, because of the preclusive effect of this Court's decision in *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989). In *Reynolds Metals*, this Court, with an

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[1] These included: BellSouth Corporation; BellSouth Services, Inc.; BellSouth Financial Services Corporation; BellSouth Advertising & Publishing Company; BellSouth Resources, Inc.; Alabama Cellular Services, Inc.; Sunlink, Inc.; and TechSouth, Inc.

[2] I note that, according to the record, the same attorney represented South Central Bell; BellSouth Corporation; BellSouth Services, Inc.; BellSouth Financial Services Corporation; BellSouth Advertising & Publishing Company; BellSouth Resources, Inc.; Alabama Cellular Services, Inc.; SunLink, Inc.; and TechSouth, Inc., before the trial court. Further, the same attorney represented CSX Transportation, Inc., in the cases it filed; see *infra*. That attorney continued to represent all the plaintiffs in this consolidated case through proceedings before the trial court, and he, along with additional counsel, continues to represent the plaintiffs before this Court.

opinion concurred in by every member of the Court as it was constituted at that time, concluded that the franchise tax, as applied to foreign corporations, did not violate the United States Constitution. Subsequently, the United States Supreme Court denied certiorari review of this Court's decision. *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990). Consequently, the final decision in *Reynolds Metals* was adverse to the taxpayer in *Reynolds Metals* and was adverse to the taxpayers in this case. The State claims that the decision of this Court in the *Reynolds Metals* case, and the refusal of the Supreme Court of the United States to review it, preclude both Bell and CSX from claiming that a different result should be reached in this case.

Because the proceedings in *Reynolds Metals* and the early stages of this litigation occurred during the same period, and because that chronological interrelatedness partially informs my conclusions regarding this case, I set out some of that chronology. The *Reynolds Metals* case was filed before Judge Gordon several months before Bell filed its action, and on July 7, 1989, Judge Gordon entered an order holding that Alabama's franchise tax, as applied to foreign corporations, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Shortly thereafter, on November 28, 1989, the Court of Civil Appeals affirmed the judgment of the trial court. See *White v. Reynolds Metals Co.*, 558 So. 2d 367 (Ala. Civ. App. 1989). Approximately three weeks later, Bell filed the action, later consolidated with actions by both CSX and the related BellSouth companies, that is now before this Court.

On January 19, 1990, approximately one month after filing its notice of appeal, Bell, through its attorney, Walter R. Byars, asked the trial court to place its case on the "administrative docket" pending the outcome of the *Reynolds Metals* action. Mr. Byars wrote:

> "[B]oth the taxpayer and the State Department of Revenue desire that further proceedings with regard

to this appeal be held in abeyance pending a final disposition of the *Reynolds* and *GMAC* cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U.S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated."

Judge Gordon subsequently placed the case on his administrative docket. It appears to me, from this letter, that both parties advised Judge Gordon that they were going to be bound by the final decision in the *Reynolds Metals* case, and that either party could proceed further only with the permission of the trial court. In short, it appears to me that the parties agreed that the final decision in *Reynolds Metals* would be controlling.

To clarify the relationship of these cases, I set out the following brief timeline:

7/7/89	Judge Gordon, in the *Reynolds Metals* case, enters an order holding that Alabama's foreign franchise tax was unconstitutional.
11/28/89	The Court of Civil Appeals affirms the trial court's *Reynolds Metals* judgment.
12/15/89	South Central Bell files its notice of appeal in *Bell*.
12/21/89	This Court reverses the judgments of the trial court and the Court of Civil Appeals in *Reynolds Metals*.
1/12/90	This Court denies rehearing in *Reynolds Metals*.
1/19/90	Bell and the State Department of Revenue file a joint request with the trial court to place *Bell* on its administrative docket, pending the final resolution of *Reynolds Metals*.
1/23/90	Judge Gordon places *Bell* on his administrative docket.
6/4/90	The United States Supreme Court denies certiorari review in *Reynolds Metals*.

8/?/90	Complaint is filed by BellSouth Corporation; BellSouth Services, Inc.; BellSouth Financial Services Corporation; BellSouth Advertising & Publishing Company; BellSouth Resources, Inc.; Alabama Cellular Services, Inc.; Sunlink, Inc.; and TechSouth, Inc. (collectively, "BellSouth"). This complaint was filed by the same lawyer representing Bell.
11/29/90	Judge Gordon orders consolidation, upon motion of the plaintiffs, of the *Bell* and *BellSouth* cases (hereinafter those cases are called *"Bell"*).
12/13/90	Several notices of appeal and complaints are filed in the Montgomery County Circuit Court by CSX, challenging foreign franchise tax assessments for various tax years. (Same lawyer as in *Bell*.)
05/28/92	Judge Gordon orders consolidation of *Bell* with the CSX cases. (Hereinafter those cases are called *"Bell"*).

The taxpayers contend that they are not precluded from litigating this action now. They rely on *State v. Delaney's, Inc.*, 668 So. 2d 768 (Ala. Civ. App. 1995) (Court of Civil Appeals held that the doctrine of claim preclusion does not apply in tax cases involving different tax years and that the doctrine of issue preclusion does not apply where the legal landscape has been altered). I am not unaware of the taxpayers' arguments that neither claim preclusion nor issue preclusion can apply in this case. While I do not necessarily disagree with the reasoning of *Delaney's* and the precedents upon which it is based, I believe this present case presents an exception to the principles of law set out in that case.

In this case it appears to me that the actions of the taxpayers show that each of them was aware of the *Reynolds Metals* litigation and that each realized that its claims were dependent on the final resolution of *Reynolds Metals*. Although I realize that the United States Supreme Court's denial of certiorari review does not necessarily

mean that the Court agrees with the conclusion reached by a lower Court,[3] and although I realize that the Supreme Court has released some opinions that could be interpreted as indicating a change in that Court's view of the constitutionality of state taxes such as that at issue in this case, the fact remains that the Supreme Court refused to review this Court's decision in *Reynolds Metals*, and that, as of today, *Reynolds Metals* remains the law.

In my consideration of the trial court's disposition of this case, I find no reversible error. All the cases that were eventually consolidated were pending before Judge Gordon, and they all involved the same counsel and the same issues. Further, Bell specifically requested that its case be held in abeyance until *Reynolds Metals* was decided. In light of these facts, Judge Gordon concluded that the taxpayers were estopped from arguing that *Reynolds Metals* did not govern this matter. I cannot hold that his conclusion amounted to reversible error. I also do not believe that the trial court's holding that the taxpayers are estopped to assert their rights violates their rights under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, in view of the holding in *Richards v. Jefferson County*, 517 U.S. 793 (1996). The operative facts of this case relating to the Due Process Clause argument are, in my opinion, wholly different.

In concluding that the trial court did not err in holding that the decision in *Reynolds Metals* precluded the claims of these particular taxpayers, I do not address the taxpayers' argument that cases decided by the United States Supreme Court since *Reynolds Metals* require a holding that the tax violates the Equal Protection and Commerce Clause of the United States Constitution.

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[3] See, generally, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), for a discussion of the effect of a denial of certiorari review.

SEE, JUSTICE (dissenting).

I respectfully dissent from the majority's no-opinion affirmance of the trial court's dismissal of this tax case. In my view, the taxpayers' claims are not barred by the doctrine of res judicata. Moreover, it is inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make of this nation a single market.

Several foreign corporations, including South Central Bell, a number of related BellSouth companies, and CSX Transportation, Inc. (collectively, the "Taxpayers"), filed separate actions against the State Department of Revenue (the "Revenue Department"), alleging that Alabama's franchise tax scheme discriminates against foreign corporations in violation of the Commerce Clause of the Constitution of the United States. The Taxpayers' actions were filed while an action filed by Reynolds Metals Company raising the same constitutional challenge was on appeal to this Court. The Taxpayers' actions were stayed, however, pending the outcome of the Reynolds Metals appeal. This Court in *White v. Reynolds Metals Co. v. Sizemore*, 558 So. 2d 373 (Ala. 1989), cert. denied, 496 U.S. 912 (1990), held that Alabama's franchise tax scheme did not violate the Commerce Clause.

The Taxpayers then proceeded with their actions, seeking refunds of foreign franchise taxes paid for the tax years 1988, 1989, 1990, and 1991. After consolidating the actions for trial, the trial court dismissed the Taxpayers' claims, holding that *Reynolds Metals* finally decided the interstate commerce issue against the Taxpayers and, thus, that their claims were barred under the doctrine of res judicata. The Taxpayers filed this appeal.

I. Res Judicata

The doctrine of res judicata applies to bar a subsequent action only when there is (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction,

(3) with the same parties, and (4) with the same subject matter presented in both actions. *Smith v. Union Bank & Trust Co.*, 653 So. 2d 933 (Ala. 1995). In *Reynolds Metals*, 558 So. 2d 373, this Court, acting with proper jurisdiction, rendered a judgment on the merits, upholding the Alabama franchise tax scheme against a Commerce Clause challenge. However, we have stated that "the doctrine [of res judicata] should be sparingly applied in tax cases involving liability for different years." *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 92, 89 So. 2d 549, 569, cert. denied, 352 U.S. 943 (1956). This is particularly true in this case, where we are dealing not only with different tax years, but also with different taxpayers. See generally *Richards v. Jefferson County*, 517 U.S. 793, ——-——, 116 S. Ct. 1761, 1768-69 (1996) (holding that the doctrine of res judicata could not bar the plaintiffs' federal constitutional challenge to a local tax where the plaintiffs had not been parties to a prior proceeding that resulted in a judgment on the tax). Further, the doctrine of res judicata does not apply when the judgment pleaded as an estoppel is based upon controlling decisions subsequently repudiated by supervening decisions, thereby necessitating a reexamination and an application of controlling precedent to the question. *Gillespie v. Commissioner of Internal Revenue*, 151 F.2d 903, 906 (10th Cir. 1945). Although the State pleads the judgment in *Reynolds Metals*, 558 So. 2d 373, as an estoppel in this case, the Supreme Court of the United States, as I explain below, has rendered intervening decisions that repudiate the *Reynolds Metals* rationale. Accordingly, the doctrine of res judicata does not bar this action.

II. Interstate Commerce

The Commerce Clause of the Constitution of the United States, art. I, § 8, provides:

> "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."

The Supreme Court has long interpreted these words not only grant Congress a broad affirmative power to regulate interstate commerce, but also to preclude States from discriminating against interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) (1851); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The negative aspect of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibits a State from engaging in economic protectionism. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1993). Thus, although States retain the police power to enact and enforce laws that will inevitably impose costs and benefits on businesses operating within their respective borders, the Dormant Commerce Clause precludes a State from so crafting its statutes as to discriminate against or unduly burden interstate commerce.

The Supreme Court has adopted a two-tiered approach in the application of its Dormant Commerce Clause jurisprudence. "When a State statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly," the Supreme Court has "examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.*

With respect to state taxes, a tax scheme is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). A state taxation scheme that on its face discriminates against interstate

commerce is "virtually per se invalid." *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Nonetheless, even a facially discriminatory tax may survive a Dormant Commerce Clause challenge if it is a "compensatory tax," that is, a tax "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994).

In *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), the Supreme Court examined a North Carolina tax that the State claimed was purportedly compensatory. The State of North Carolina imposed an intangibles tax on the fair market value of stock owned by North Carolina residents. *Id.* at 327-28. The State, however, reduced the base of the intangibles tax by an amount that varied with the proportion of the corporation's income subject to North Carolina income tax. *Id.* Under this variable reduction scheme, residents who owned stock in a corporation that earned all of its income in North Carolina paid no intangibles tax, while residents who owned stock in a corporation that earned all of its income outside North Carolina paid the intangibles tax on the full fair market value of the shares owned. *Id.* Because the tax was computed on a different net base depending on the extent of the corporation's out-of-state activities, it facially discriminated against interstate commerce. *Id.* at 328, 333 & n.3 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.")).

The Supreme Court then addressed whether the North Carolina intangibles tax was nonetheless valid as a "compensatory tax." The Supreme Court set forth three conditions for upholding a discriminatory tax as a "compensatory tax":

> "First, 'a State must, as a threshold matter, "identif[y] . . . the [intrastate tax] burden for which the State is attempting to compensate."' . . . Second, 'the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce.' . . . 'Finally, the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent"; that is, they must be sufficiently similar in substance to serve as mutually exclusive "prox[ies]" for each other.'"

Fulton, 516 U.S. at 332-33 (citations omitted). The Supreme Court rejected North Carolina's argument that its general corporate income tax imposed an intrastate burden for which the specific intangibles tax was meant to compensate.[4] *Id.* at 334-36. "[P]ermitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds." *Id.* at 335 (quoting *Oregon Waste*, 511 U.S. at 105 n.8 (quoting *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993))).

Next, the Supreme Court held that North Carolina had failed to demonstrate that its intangibles tax on interstate commerce roughly approximated, but did not exceed, that portion of its general corporate income tax on intrastate

[4] The Supreme Court noted that the identified intrastate tax must serve a legitimate purpose for which the State could impose a burden on interstate commerce. *Fulton*, 516 U.S. at 334-36. The Supreme Court rejected North Carolina's argument that its general corporate income tax supported a capital market that the corporations had availed themselves of by selling stock to North Carolina residents. *Id.* The Supreme Court held that the relationship between North Carolina's general corporate income tax and its capital markets was too tenuous to allow a general tax on intrastate activities to serve as a complement to a specific discriminatory tax on interstate commerce. *Id.* at 336.

commerce that benefited foreign corporations (by creating a capital market that facilitated the sale of stock to North Carolina residents). *Id.* at 337-38. The Supreme Court stated "[w]here general forms of taxation are involved, we ordinarily cannot even begin to make the sorts of quantitative assessments that the compensatory tax doctrine requires." *Id.* at 338.

Finally, the Supreme Court held that North Carolina had failed to show that the events taxed by the intangibles tax, which taxed the value of stock, and by the general corporate income tax, which taxed income, were "substantially equivalent." *Id.* at 338-44 "Although we found such equivalence in the sales/use tax combination at issue in [*Heneford v. Silas Mason Co.*, 300 U.S. 577 (1937)], our more recent cases have shown extreme reluctance to recognize new compensatory categories." *Id.* at 338. The Supreme Court then concluded: "While we doubt that such a showing can ever be made outside the limited confines of sales and use taxes, it is enough to say here that no such showing has been made." *Id.* at 344.

Like the North Carolina intangibles tax, the Alabama franchise tax facially discriminates against interstate commerce. The State imposes the domestic corporation franchise tax on a base generally equal to the par value of the corporation's stock. See Ala. Code 1975, § 40-14-40 (imposing a 1% tax on the capital stock of domestic corporations). It imposes the foreign corporation franchise tax on a base generally equal to the portion of a corporation's total capital (that is, the par value of its stock, plus surplus, plus long-term debt, etc.) employed in the state, computed in accordance with generally accepted accounting principles. See Ala. Code 1975, § 40-14-41 (imposing a 0.3% tax on the capital employed in Alabama by foreign corporations). It is not facially apparent that application of the foreign franchise tax rate (0.3%) to the much larger base of par value plus other items such as surplus and long-term debt merely equalizes the burden produced

by the application of the domestic franchise tax rate (1%) to the easily manipulable base of par value. Simply by changing its state of incorporation from Alabama to any other state, a corporation operating in Alabama subjects numerous additional items on its balance sheet (e.g., surplus, long-term debt) to Alabama franchise taxation. The franchise tax facially discriminates against interstate commerce, and arguments over the degree of the discrimination do not affect this characterization. See, e.g., *Associated Indus.*, 511 U.S. at 650 ("[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question of whether discrimination has occurred.") (citing *Louisiana v. Maryland*, 451 U.S. at 760 (1981)). Accordingly, Alabama's discriminatory foreign franchise tax can withstand a challenge under the Dormant Commerce Clause challenge only if that tax may be properly characterized as a "compensatory tax."

The State asserts that the higher rate of the domestic franchise tax and the additional tax imposed only on the shares of domestic corporations combine to impose an intrastate burden for which the higher foreign franchise tax compensates. See Ala. Code 1975, § 40-14-70 (imposing a shares tax by subjecting to property taxes 20% of a base roughly equal to the book value of the domestic corporation). Although this Court accepted a similar argument in *Reynolds Metals*, 558 So. 2d at 382-90, the Supreme Court has since clarified and narrowed the definition of a compensatory tax. *Fulton*, 516 U.S. at 332-33; *Oregon Waste*, 511 U.S. at 102. Assuming, arguendo, that the State has satisfied the first prong of *Fulton*, 516 U.S. at 332, by identifying intrastate taxes for which the discriminatory interstate tax is meant to compensate, the discriminatory interstate tax does not meet the second and third prongs of the Supreme Court's narrow definition.

The State has failed to demonstrate that its tax on interstate commerce—that is, the portion of the foreign

franchise tax produced by the higher tax base—roughly approximates, but does not exceed, the portion of the intrastate domestic franchise tax produced by the higher rate and the intrastate corporate shares tax. See *Fulton*, 516 U.S. at 332-33. In the face of the State's indefinite assertion that the general burden of the domestic franchise tax and the shares tax roughly approximates the burden imposed by the foreign franchise tax, the Taxpayers offer substantial evidence supporting the proposition that the foreign franchise tax exceeds any intrastate burden. The State, and not this Court, bears the exacting burden of showing that the interstate tax roughly approximates, but does not exceed, the identified intrastate taxes. See *Oregon Waste*, 511 U.S. at 105 (stating that the Supreme Court will not "plunge . . . into the morass of weighing comparative tax burdens"). The State has not borne its burden, and therefore has not met the second prong of *Fulton*.

The State also fails to show that the events taxed by Alabama's intrastate taxes and the interstate tax are "substantially equivalent." See *Fulton*, 516 U.S. at 333, 336-38. Unlike the mirror-image sales and use taxes approved in *Silas Mason*, 300 U.S. 577, which were, generally speaking, imposed on in-state and out-of-state sales, the foreign franchise tax is imposed on the event of doing business in the State, while the shares tax is imposed on the ownership of shares of stock. These two significantly different taxes cannot be viewed as "mutually exclusive proxies" for each other. See *Fulton*, 516 U.S. at 333, 338-40. The State has not met the third prong of *Fulton*.

The Alabama foreign franchise tax cannot be sustained as a compensatory tax. Accordingly, I would reverse the judgment of the trial court and remand for a determination of the proper remedy.

I dissent.

Kennedy and Butts, JJ., concur.

APPENDIX B

FIFTEENTH JUDICIAL CIRCUIT
CIRCUIT COURT

Consolidated Case No. CV-89-2600-G

Case Nos. CV-89-2600, CV-90-1591, CV-90-1711, CV-91-397, CV-91-1079

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs,

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

Case Nos. CV-90-2555, CV-90-2556, CV-90-2557, CV-90-2558, CV-91-2151

CSX TRANSPORTATION, INC.,
Plaintiff,

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

MEMORANDUM OPINION AND ORDER

In these consolidated actions, several foreign corporations (Taxpayers) subject to Alabama's foreign corporation franchise tax (*Ala. Code* § 40-14-41 (1975)), challenge the validity of Alabama's franchise tax scheme on

federal [1] and state [2] constitutional grounds. Each Taxpayer seeks a refund of franchise tax it paid, plus interest.[3]

The collective challenges by the Taxpayers are before the Court by means of various procedural vehicles, e.g., petition for declaratory judgment and refund (§§ 6-6-221 to 232 and § 40-1-11); appeals from final assessments pursuant to the Alabama Administrative Procedures Act; and petitions for mandamus or appeals from denial of petitions for refund of foreign franchise taxes (§ 40-1-34). In addition, the Taxpayers bring their action pursuant to 42 U.S.C.S. §§ 1983 and 1988, and they seek to recover their attorneys' fees and all costs of these actions.

This is the second occasion this Court has had to consider the validity of the Alabama franchise tax on foreign corporations. *Reynolds Metals Co.; et al., v. James C. White, Jr., et cetera; et al.*, Civil Action No. CV-86-1093-G (Montgomery County, Alabama, Circuit Court)

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[1] The taxpayers contend that Alabama's franchise tax scheme facially or as applied, or both, violates the equal protection clause and the commerce clause of the United States Constitution. U.S. Const., amendment XIV; U.S. Const., art. I, § 8, clause 3.

[2] The taxpayers contend that Alabama's franchise tax scheme violates the due process and equal protection clauses of the Alabama Constitution. The taxpayers also contend that the legislature impermissibly delegated its authority to the Department of Revenue to define the tax base for taxing domestic corporations in violation of Ala. Const., art. XI, § 212; and art. IV, § 44. Finally, they contend that § 40-14-41 levies the foreign franchise tax on a tax base which includes components of capital which are not authorized by Ala. Const., art. XII, § 232.

[3] South Central Bell paid franchise taxes under protest for the years 1986 through 1991, and it seeks a refund of $30,748,066.31, plus interest. Bell South Corporation and several of its subsidiaries seek refunds of tax paid for the tax years 1990 and 1991 in the amount of $810,880.00, plus interest. CSX Transportation, Inc., and some of its predecessors, seek refunds of taxes paid for tax years 1982 through 1991 in the amount of $5,690,235.76, plus interest.

(hereinafter *Reynolds*). This Court ruled based on federal equal protection grounds, that the franchise tax scheme impermissibly discriminated against foreign corporations but applied the ruling prospectively. The ruling was affirmed by the Alabama Court of Civil Appeals. *White v. Reynolds Metals Co.*, 558 So. 2d 367 (Ala. Civ. App. 1989); however, the ruling by this Court and the decision of the Alabama Court of Civil Appeals was reversed by the Supreme Court of Alabama, *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied, Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

In view of the history of the franchise tax litigation, the State of Alabama strongly asserts that this action is barred by *res judicata* (issue preclusion and claim preclusion), and that all claims raised by the Taxpayers were decided adversely to them in *White*, 558 So. 2d 373. The Taxpayers contend that even if this action is barred by *res judicata* as determined by Alabama law, applying the doctrine in this case would deprive him of due process of law guaranteed by the Fourteenth Amendment. *Richards v. Jefferson County, Alabama*, 517 U.S. ——, 135 L.Ed. 2d 76 (1996).

The Court holds that based upon Alabama jurisprudence, the Taxpayer's claims are barred by *res judicata*.[4]

Having determined that the Taxpayers' claims are barred by *res judicata*, as that doctrine is defined by the decisions of the Alabama Supreme Court, the Court must next determine whether the bar is an extreme application of the doctrine which denies the Taxpayers their day in court in violation of their federal due process rights guaranteed by the Fourteenth Amendment. *Richards*.

Richards was decided on a ground not presented to the trial court and which was only presented to the Alabama

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[4] This Court initially denied the Department of Revenue's motion for summary judgment based on the doctrine of *res judicata* and which raised issues of *stare decisis*.

Supreme Court on application for rehearing. *Richards*, 135 L.Ed.2d 83, fn. 3. The United States Supreme Court focused on the Alabama Court's holding that the plaintiffs in *Bedingfield* adequately represented the plaintiffs' class interests in *Richards*. *Id.* at 84. As understood by this Court, the United States Supreme Court held that under the facts of *Richards*, the finding by the Alabama Supreme Court that the petitioners were adequately represented by the *Bedingfield* plaintiffs was erroneous because the petitioners (a class of plaintiffs) did not receive notice of the *Bedingfield* litigation and they were not sufficiently represented in the *Bedingfield* litigation. *Id.* at 88. However, the Court does not understand *Richards* to hold that there is no tax case when *res judicata* cannot bar a subsequent action attacking the levy on Federal Constitutional grounds.

The defendants in this action are not attempting to bind a "class" of persons to a prior judgment to which they were not a party. The Taxpayers are large and sophisticated corporations, and it is logical to conclude that they are well informed in all matters involving issues of national and state taxation, and that they stay well informed of significant pending legal actions and court decisions. This is not to suggest that a corporation is entitled to any less notice and the opportunity to be heard than a private citizen; indeed, they have the same rights under our State and Federal Constitutions. However, it is logical to resolve an evidentiary issue of notice against the sophisticated and more informed non-party.

South Central Bell Telephone Company is the lead party in these consolidated actions. It filed its administrative appeal in this court on December 15, 1989, which was after the Alabama Court of Civil Appeals had affirmed this Court's ruling that the franchise tax on foreign corporations violated the Federal Constitution, and 14 days before the Alabama Supreme Court reversed. The

Taxpayers admit that they were aware of the *Reynolds* action at the time of this Court's decision in that case. The decision of the Court of Civil Appeals was known to South Central Bell at the time of the administrative proceedings before the Department of Revenue. *See* South Central Bell's complaint and petition for judicial review, p. 3. Therefore, as admitted, South Central Bell and the other Taxpayers had actual notice of the *Reynolds* litigation.

This Court issued its ruling finding that the foreign franchise tax was unconstitutional on ————————, and on ————————, the Court issued a separate ruling applying the ruling prospectively only and denying the *Reynolds* taxpayers' claims for refunds of foreign franchise taxes. The *Reynolds* taxpayers were represented by well known and excellent counsel who were experienced in constitutional litigation of this nature. Although all of the precise arguments may not have been made in *Reynolds* that are presented to this Court, the *Reynolds* action and this action arise out of the same nucleus of operative facts, and the *Reynolds* taxpayers as well as the Taxpayers in this action contend that the foreign franchise tax violates the equal protection and commerce clauses of the Federal Constitution. Both of these claims were addressed and decided in *Reynolds* by the highest court of this state. There was not a significant lapse of time between the *Reynolds* litigation and these consolidated actions as there was in *Bedingfield* and *Richards*. There is no conflict between the interests of the *Reynolds* taxpayers and the Taxpayers in this action. *See Hansberry v. Lee*, 311 U.S. 32 (1940). Finally, the Court notes that the Taxpayers are represented by the same attorney.

Based upon the foregoing reasons, the Court concludes that applying the bar of *res judicata* to these consolidated actions does not violate the Taxpayers' due process rights.

Notwithstanding the holding that these consolidated actions are barred by *res judicata,* the Court has considered at length the issues presented and the evidence, and it will address in summary fashion the merits of this action because of the public importance of the issues presented.

The Taxpayers ask the Court to revisit the Alabama franchise tax scheme on foreign corporations for several reasons: (1) the enhanced quality of their evidence [5]; (2) because their attack on the tax scheme is based on different theories; and (3) because commerce clause jurisprudence has evolved significantly since the decision in *Reynolds* in 1989.[6]

The Court holds that the Taxpayers have an adequate remedy under Alabama law; therefore, the Tax Injunction Act (28 U.S.C.S. § 1341) would have precluded them from seeking an injunction in Federal Court. Because of this, their claims based on 42 U.S.C.S. §§ 1983 and 1988 are due to be dismissed. *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 515 U.S. ——, 132 L.Ed.2d 509 (1995).

The Court holds that the legislature has not delegated its power to tax to the Alabama Department of Revenue; therefore, there is no violation of sections 44 or 212 of the Alabama Constitution.

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[5] Of course, the Taxpayers had the advantage of being able to tailor their evidence to address the evidentiary analysis applied by the Alabama Supreme Court in *Reynolds.*

[6] The Taxpayers may also be impliedly asserting that the *Reynolds* Court did not properly apply commerce clause jurisprudence because the court seemed to assume that equal protection analysis was equally applicable to determine the issues presented under the commerce clause. *See Reynolds,* at 382 (the court said that "the ultimate question in applying equal protection or commerce clause analysis to the facts is virtually the same.")

The Court is not convinced, based on the Taxpayer's evidentiary foundation, that the foreign corporation franchise tax statute violates § 232 of the Alabama Constitution because it includes components as capital which were not historical components of capital in 1901.

The Court holds that the Taxpayers' claims and arguments bottomed on the equal protection clauses of the Federal and State Constitutions were exhaustively addressed by the Alabama Supreme Court in *Reynolds* and decided adversely to their positions as urged in this action. Therefore, this Court is bound by the decision in *Reynolds* on these claims, and they are due to be dismissed. The Court does not, however, reach the same conclusion with respect to the Taxpayers' claims based on the commerce clause of the Federal Constitution.

In *Reynolds,* the Alabama Supreme Court addressed many of the commerce clause cases cited by the Taxpayers in this action; however, the Court believes that since 1989, the United States Supreme Court has made it abundantly clear that a state's tax scheme cannot impose the slightest burden on interstate commerce unless there is some reason for doing so other than economic protectionism. *Oregon Waste Systems v. Department of Environmental Quality,* 511 U.S. ——, 114 S. Ct. 1395 (1994); *Associated Industries v. Lohman,* 511 U.S. ——, —— S. Ct. —— (1994). In addition, the decision in *Fulton Corporation v. Faulkner,* —— U.S. ——, 133 L.Ed.2d 796 (1996), enlightens the analysis of the complementary tax doctrine and appears to supercede the reasoning of the *Reynolds* court. The Court finds that the Taxpayers' evidence [7] in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorpora-

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[7] See Taxpayers' brief filed May 17, 1994, pp. 10-39, which the Court finds to fairly state the evidence in this case and, except as otherwise indicated, the Court adopts as its own.

tion. Accordingly, the Court finds that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution.

Consistent with the Court's opinion in the *Reynolds* litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund.

Because the Court has held that this action is barred by *res judicata* and the application of that doctrine does not violate the Taxpayers' equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayers' claims are dismissed, and the costs of this action are taxed against the Taxpayers.

DONE and ORDERED this 3rd day of December, 1996.

/s/ William Gordon
WILLIAM GORDON
Circuit Judge

cc: Ron Bowden, Esq.
Walter R. Byars, Esq.

APPENDIX C

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Case No. CV-89-2600 (with consolidation of CV-90-1591, CV-90-1711, CV-91-397 and CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Case No. CV-90-2555 (with consolidation of CV-90-2556, CV-90-2557, CV-90-2558 and CV-91-2151)

CSX TRANSPORTATION, INC.,
Plaintiff

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Consolidated As CV-89-2600-G

BRIEF OF PLAINTIFFS/TAXPAYERS

WALTER R. BYARS
STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

Attorney for Plaintiffs

[Extracted from pages 10-39 of Brief of Plaintiffs/Taxpayers filed in Circuit Court on May 17, 1994; incorporated by the Circuit Court in its opinion (slip op. 9 n.7) dated December 3, 1996, *see* Pet. App. 21a n.7.]

STATEMENT OF THE FACTS

For the purposes of Alabama franchise tax, a domestic corporation is any corporation organized under the laws of Alabama [11] while a foreign corporation is any corporation organized under the laws of any state other than Alabama.[12] Each of the Taxpayers was a foreign corporation engaged in interstate commerce and doing business within Alabama and in each of the applicable tax years was taxed as a foreign corporation and required to file and pay, and filed and paid, Alabama franchise tax as a foreign corporation pursuant to § 40-1-41. (Stipulated Facts, Pars. 1-5; Affidavits, Shepherd, p. 2 and Hanford, p. 2, Par. 2) Taxpayers as foreign corporations (and other foreign corporations) were required to pay Alabama franchise taxes on the tax base set forth in § 40-14-41 and as required by the Department solely by virtue of the fact that each of those corporations is organized in a state other than the State of Alabama. (Admission, 24; Stip., Par. 2)

Under the Alabama franchise tax scheme, a different franchise tax based on a different tax base is levied on foreign corporations pursuant to § 40-14-41 than is levied on domestic corporations pursuant to § 40-14-40.[13] A difference in the tax base is required by the Alabama Constitution of 1901: Art. XII, § 232, mandates the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state," but does not define "capital employed in this state." Art. XII, § 229, mandates the levy of a franchise tax on domestic corporations in "proportion to the amount of capital stock," but does not define "capital stock" or the "amount of the capital stock." (Stip., Pars. 5-10, inclusive) "Capital stock" on which tax base domestic corporations are required to pay Alabama franchise tax is not defined in either § 229 or § 40-14-40 (Stip., Par. 16); and there are no legislative or statutory guidelines for defining or applying the domestic franchise tax base of "capital stock." (Broadhead Dep., pp. 18-19, 32-3; [14] White Aff., Par. 3) "Capital employed," though not defined in § 232, consists of components clearly defined in § 40-14-41.

Taxpayers as foreign corporations (and all foreign corporations) doing business in Alabama were required to pay Alabama franchise tax pursuant to § 40-14-41 in an amount which is determined by applying the tax rate of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to § 40-14-41, the amount of capital employed which is the tax base against which this tax rate is multiplied is the total actual value of the following items of capital em-

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11 "Every corporation organized under the laws of this state. . ." § 40-14-40.

12 "Organized under the laws of any other state, nation or territory. . . ." § 40-14-41(a).

13 There is a separate statute levying each tax; under those separate statutes, there is a different base for domestic corporations than for foreign corporations; and there is a different tax rate since 1984. Prior to 1984, the tax rate was the same for both domestic and foreign corporations, $3.00 per $1,000 to be applied against the different tax bases. Since 1984, the foreign corporations have continued to be taxed at $3.00 per $1,000 on their tax base, and domestics have been taxed at $10 per $1,000 on a par value tax base. (Broadhead Dep., pp. 18-19)

14 Ernest J. Broadhead, deposed by Taxpayers, is and has been Chief of the Franchise Tax Division, Alabama Department of Revenue, since July 1982, and is the person with state government most familiar with the purposes behind and application of the franchise tax and domestic shares tax laws in Alabama. (Broadhead Dep., pp. 6-7)

ployed by that corporation in Alabama (subject to exclusions and deductions and the maximum tax base for public utilities): [15]

(1) Outstanding capital stock;

(2) Surplus and undivided profits;

(3) Long-term debts;

(4) Certain related party debts; and

(5) Accelerated depreciation.

In addition to these five items included within the statutory definition of "capital employed in this state," [16] since 1982 Department has required on the foreign franchise tax return that deferred income taxes be included as a separate additional item in the tax base. (Stip., Par. 5; Admission, 4A; Broadhead Dep., p. 63; White Aff., Pars. 3 & 9) The franchise tax imposed on Taxpayers (and other foreign corporations) pursuant to § 40-14-41 was (and is) based on the actual value of the capital employed in the State of Alabama, including the actual value of each of the statutory components set forth in § 40-14-41, and of deferred income taxes as a component

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[15] The foreign tax base is subject to the exclusions and deductions as set forth in § 40-14-41(d) and to the maximum tax base for public utilities and transportation companies, which include all CSXT Taxpayers and Taxpayer South Central Bell (now BellSouth Telecommunications, Inc.) in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama as set forth in § 40-14-41(c). (Stip., Par. 5; Admission, 4A)

[16] Since September 8, 1961, upon passage of Act No. 912, § 40-14-41 and its predecessors have included these five statutory components, which have constantly remained a part of the foreign franchise tax base. Surplus and undivided profits, long-term debts, related party debt and accelerated depreciation were first included as components of "capital employed" upon passage of Act No. 912. (Stip., p. 51-55)

required by the Department.[17] (Admission 4B; Stip., Par. 18; White Aff., Pars. 3 & 9)

The Alabama franchise tax imposed upon domestic corporations pursuant to § 40-14-40 is computed by applying the tax rate of $10 per $1,000 (except during 1982 and 1983, the tax rate was $3 per $1,000) to the amount of the par value of the capital stock of the domestic corporation with "par value" capital stock and to the amount of stated value of the capital stock of the domestic corporation with "no-par" capital stock. (Stip., Par. 9)

The tax base upon which Alabama franchise tax is imposed pursuant to § 40-14-40 on domestic corporations is defined in the statute only as "its capital stock," but as applied by the Department is imposed solely on the "par value" (or if "no-par" capital stock, on the "stated value") of the capital stock of the domestic corporation as the sole franchise tax base for domestic corporations.[18] (Stip., Pars. 15-17 & 29; White Aff., Pars. 3-4 & 9)

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[17] Deferred taxes does not appear in the statute nor in the Alabama Constitution, nor in writing as a regulation of the Department. The Department has, by interpretation and without statute or Constitution, included deferred taxes on the foreign tax return as requiring foreign franchise taxes to be paid on this additional factor in determination of capital employed. (Broadhead Dep., pp. 59-63) Deferred taxes has appeared as a factor for determining the "capital employed" tax base on the foreign franchise tax return since 1982. (Broadhead Dep., p. 63)

[18] "Par value" has never been the standard adopted by the Legislature. Prior to the early 1900s, there was no domestic franchise tax. When the Legislature enacted a domestic franchise statute [Act 216, § 12, General Acts of Alabama 1911], the statute defined the tax base as "paid-up capital stock." This standard remained until the statute was changed to levy the tax "based on its capital stock," which tax base has remained in effect until the present time. General Acts of Alabama, Act No. 172, § 10, & Act No. 263, § 10 (1923) The Department, at least since 1935, has applied "par value" as the tax base. "Paid-up" capital stock is not the equivalent of par value of capital stock. "Paid-up" capital stock includes

"Par value" does not appear in § 40-14-40 levying Alabama franchise tax on domestic corporations; that statute states "its capital stock," but does not define "capital stock." (Stip. Pars. 56-58) Neither the Alabama Constitution nor § 40-14-40 establishes "par value" as the tax base for domestic corporations. The Department has defined "capital stock" insofar as its levy on domestic corporations is concerned as "par value of capital stock," which appears as the tax base on the domestic franchise tax form or return. (Broadhead Dep., pp. 32-3, 36-37) Par value is not the real value of the capital stock, it is an arbitrary fictional value rather than its real or actual value. (Admission 18; Broadhead Dep., pp. 31-32; White Aff., p. 4)

Neither the par value nor the stated value of shares of capital stock of a domestic corporation represents the book value or market value or actual or real value of the capital stock of the domestic corporation as a going concern. (Stip., Pars. 19 & 20; Broadhead Dep., p. 34; White Aff., Par. 4, p. 5)

There is no reason under the statute—§ 40-14-40—or the Constitution that would prohibit the Department through interpretation or regulation, from adopting actual value, book value or market value (rather than its adoption of par value) for the definition of capital stock and levy the tax on any one of those bases. (Broadhead Dep., p. 40; Stip., Pars. 56-58)

Alabama franchise tax on domestic corporations, as applied by the Department, uses (and has used) a tax base of "par value" (or stated value) of the capital stock. (Broadhead Dep., p. 34) "Par value" of the corporate stock of domestic corporations with par value stock was

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all of the consideration paid by the subscriber to the capital stock, including capital surplus. "Par value" by definition excludes capital surplus. (White Aff., Par. 4; Broadhead Dep., pp. 36-38)

used by the Department during the tax years 1982 through 1991 as the tax base upon which domestic franchise taxes are applied or calculated. The tax base used for Alabama domestic franchise tax does not include, and the domestic franchise tax imposed pursuant to § 40-14-40 is not computed by applying the applicable tax rate multiplied by, the book value or market value or actual value of the domestic corporation's capital stock. (Stip., Pars. 11 & 12; Broadhead Dep. p. 34)

Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to § 40-14-40 based solely on a tax base of the "par value" (or where no-par, the "stated value") of the shares of capital stock of domestic corporations while levying Alabama franchise tax on Taxpayers (and other foreign corporations) engaging in business within Alabama pursuant to § 40-14-41 based on the actual value of capital employed in Alabama by each foreign corporation, which "capital employed" tax base included the actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation as provided by statute, and of deferred income taxes required by the Department to be included as a separate item in the tax base.[19] (Stip., Pars. 28 & 29; White Aff., Par. 9)

The tax base upon which Alabama franchise tax is imposed upon domestic corporations pursuant to § 40-14-40 does not include surplus and undivided profits and long-term debts, the amount of certain related party debt, or the accelerated depreciation of the domestic corporation, all statutory components of the foreign franchise tax base, or deferred taxes which was a Department required component of the foreign franchise base. None of these com-

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[19] Subject to the exclusions and deductions set forth in § 40-14-41(d) and to the maximum tax base for public utilities and transportation companies as set forth in § 40-14-41(e).

ponents or factors is used by the Department in determining the amount of "its capital stock" or the amount of franchise tax to be paid by a domestic corporation. (Stip., Par. 13) The tax base for foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid pursuant to § 40-14-41 includes the value of items of capital—surplus and undivided profits, long-term debt, certain related party debt, accelerated depreciation and deferred taxes—not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid pursuant to § 40-14-40. (Stip., Pars. 13 & 14; White Aff., Pars. 3-4 & 9)

A domestic corporation organized under the laws of Alabama may control the amount of its domestic franchise tax by assigning as the "par value" or "stated value" of its capital stock any value selected by it, and may by its own action incorporate with a minimal amount assigned as "par value" or "stated value," and may thereafter increase or decrease the "par value" of its capital stock, without any basis, measure or yard stick for determining "par value" or the amount of "par value." (Stip., Pars. 21 & 22; Admission 20) A domestic corporation can arbitrarily and unilaterally reduce the amount of franchise tax paid by it to the minimum tax by establishing a low par value upon incorporation or by later reducing at any time the par value (or stated value) of its capital stock. (Stip., Par. 24; White Affidavit, Pars. 4-5)[20]

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[20] White, in the practice of his profession, has advised many corporations, both prior to and after incorporation, to utilize and they have utilized a minimal arbitrary "par value" to minimize the domestic franchise tax liability, and to change the par value of their capital stock. Foreign corporations have been advised and have incorporated under Alabama law wholly-owned domestic subsidiaries with a minimal par value to minimize (even to the minimum tax) franchise tax liability, while the actual amount of the parent foreign corporation investment in the capital of the subsidiary is excluded from the foreign franchise tax liability. The Alabama franchise tax scheme provides tax incentives to induce

A foreign corporation doing business in Alabama cannot reduce the amount of its Alabama franchise taxes paid by it, or reduce the actual amount of its capital employed in Alabama, by reducing the par value or the stated value of its capital stock. (Stip., Pars. 25 & 26) "Par value" or changes in "par value" for foreign corporations have no effect on the foreign franchise base or the foreign franchise tax liability (White Aff., Par. 5)

The franchise tax base for foreign corporations (but not for domestic corporations) increases, and foreign corporations (but not domestic corporations) incur increased franchise tax liabilities, with corresponding increases in the retained profits or accumulated surplus, increases in long-term and related party debt or as the depreciation reserve is increased by the utilization of accelerated depreciation and is increased as deferred taxes of the foreign corporation increase. (Stip., Pars. 61-64; White Affidavit, Par. 5; Interrogatory, 6 A, B & C)

In addition to the foreign and domestic franchise taxes, there are permit fees levied and paid by both franchise and domestic corporations which are essentially identical in amounts. Additionally, there is a separate ad valorem tax levied on shares of capital stock of domestic corporations under § 40-14-70 ("domestic shares tax") and an equivalent ad valorem tax levied on the shares of capital stock of foreign corporations under § 40-11-1(9) (which exempts shares of capital stock of domestic corporations). Both ad valorem taxes are levied on the shareholder and not the corporation; however, the domestic shares tax levied under § 40-14-70 is normally paid by the corporation as a volunteer, but not imposed on the corporation by statute (only by virtue of the corporation having con-

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incorporation under the laws of Alabama, which result in discrimination in favor of domestic corporations incorporating under Alabama law to the detriment of and imposing a higher tax burden on foreign corporations solely on the basis of the state of incorporation. (White Aff., Par. 6)

sented in writing on the tax form to pay the shares tax).[21] (Broadhead Dep., pp. 19-22, 67; White Aff., Pars. 7-8) "Capital stock" in the franchise tax base is part of the financial structure of the corporate entity and is the property of the corporation, which appears on the books of the company; absent corporate dissolution, the shareholder has no right to the capital stock account of the corporation. The shares of capital stock included as the property subject to ad valorem tax on domestic and foreign corporate shares are the property of each shareholder evidencing his investment in the corporation, which the corporation has no right to take away from the shareholder. (Broadhead Dep., pp. 67-8; White Aff. Pars. 7-8)

The Alabama domestic franchise tax is an excise tax imposed upon the corporate existence of a domestic corporation based on the amount of "capital stock" (Admission, 5(b)); foreign franchise tax is likewise an excise tax, but is imposed on the privilege of doing busiess as a corporation in Alabama (Stip., Par. 16) and based on the amount of "capital employed" in Alabama. Neither is based on the value of property nor is an ad valorem tax. (Broadhead Dep., pp. 40-1, 122; White Aff., Par. 7)

The domestic shares tax levied pursuant to § 40-14-70 is an ad valorem tax levied on the shares of stock owned by the shareholder and is an ad valorem tax on ownership; the tax on the shares of stock of foreign corporations imposed by § 40-11-1(9) is also levied as an ad valorem tax on the ownership of shares of stock by the shareholder of the corporation. (Broadhead Dep., pp. 145-47; White Aff., Pars. 7-8) The taxable event of the domestic shares tax is the ownership of the shares of stock based on their

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[21] Section 40-14-73 permits the domestic corporation as a volunteer to pay the shares tax imposed upon its shareholders and the domestic shares tax return form—Taxpayers' Exhibit 14—reflects that an agreement that authorizes the collection of the corporate shares tax against the corporation. However, under the statute, the domestic shares tax levy is actually against the shareholder and not the corporation. (Broadhead Dep., p. 155; White, Par. 7)

value, while the taxable event in the case of franchise taxes is the incorporation in Alabama or the qualifying to do business in Alabama. The domestic shares tax is not comparable to the Alabama franchise taxes because taxes are levied on different persons (corporation vs. shareholder), on a different tax base (capital stock vs. shares of capital stock) and on a distinctly different taxable event (privilege tax on incorporation or doing business vs. ad valorem tax on the value of property). (White Aff., Par. 7)

The tax base is different between foreign franchise tax and domestic shares tax. The tax base for the foreign franchise tax includes in addition to the value of outstanding capital stock, other components of long-term debt, certain related party debt, and accelerated depreciation by statute and deferred taxes by order of the Department. The domestic shares tax includes only the value of the shares of capital stock, not the capital account in the corporation and not any debt, accelerated depreciation or deferred taxes account. (White Aff, Par. 9, pp. 10-11) The domestic shares tax excludes certain things from its tax base, the base being the residue after deducting government obligations, book value of tangible property in other states, air pollution equipment, book value of equipment, book value of inventory, book value of motor vehicles and cost of capital owned in domestic corporations, all of which is deducted from the total value of the capital stock of the domestic corporation, which is then reduced to the 20% assessment value of the residue, from which is deducted the assessed value of real and tangible personal property upon which ad valorem is paid in Alabama by the domestic corporation. While some of the deductions can be made from the foreign franchise tax base (e.g., air pollution equipment and cost of capital stock owned in domestic corporations), the other deductions are not available from the foreign franchise tax. Specifically, foreign corporations may not deduct the value of real and tangible personal property upon which ad valorem taxes

have been paid from their foreign franchise tax base. (Broadhead Dep., pp. 147-49) Further, the purchase of short-term U. S. Government obligations at the end of the fiscal year could effectively eliminate any remainder subject to domestic shares tax. (White Aff., Par. 9, p. 11)

The domestic shares tax should not be considered as a part of the domestic corporation's tax burden nor as complementary to the franchise tax. (White Aff., Par. 7, p. 9) The Alabama domestic shares tax is complementary to the ad valorem tax imposed upon the shareholder/owner of the shares of capital stock in foreign corporations levied pursuant to § 40-11-1(9); each is imposed upon the shareholder/owner of the shares of stock; each is an ad valorem tax based on a taxable incident of ownership on the same return date—October 1—and at the same taxable assessed value of 20%. The collection agency for the ad valorem taxes on domestic shares and on foreign shares is the county government (not the State). (White Aff., Par. 8; Broadhead Dep., pp. 121-22)

"A Study of the Differences in Franchise Tax Liability for Foreign vs. Domestic Corporations—Alabama." [22] by Dr. Larry E. Richards,[23] which was prepared from a scientific sample designed by and conducted under the supervision and direction of Richards, was commissioned and introduced by Taxpayers. The details of the underlying documentation and computations used in the Study are set forth in the Affidavits of Adele Howell Shepherd and James D. Hanford.

[22] This Study was attached to the Affidavit of Dr. Larry E. Richards, which Affidavit was supplemented. The Study was based on a valid statistical sample of domestic corporations, the source data was obtained from information furnished by the Department and the statistical procedures applied in the research (stratification, sampling, estimators, tests and interval estimates) have mathematically (provable) foundations and are in accordance with generally accepted valid statistical practice and procedures. (Study, pp. 22, 1, 4, 9-16) Although the Study has lengthy appendices showing underlying data, the Study and its conclusion are documented on the first 22 pages.

[23] Chairman of the Decision Sciences Department of the School of Business at the University of Oregon with vast experience as a statistician employed to conduct studies relating to taxation. Richards' Vita is attached to his affidavit.

The objective of the Study was to determine whether the Alabama franchise tax scheme was discriminatory between domestic and foreign corporations prior to 1992 with primary emphasis of the Study on the time period 1988-91. (Study, p. 1)[24] The Study noted that Alabama had different franchise tax bases and rates for domestic vs. foreign corporations which create differential treatment and the potential for discrimination based solely on the state of incorporation, which differences necessarily result in differential treatment which facially or as applied may result in discrimination between domestic and foreign corporations. (Study, p. 1)

The Study concludes that Alabama franchise tax statutes as applied have in fact resulted in discrimination in favor of domestic corporations to the detriment of foreign corporations, which discrimination was determined by comparing the domestic franchise tax paid by the sampled corporations under § 40-14-40 with the foreign franchise tax liability calculated under § 40-14-41 by treating the sampled domestic corporations as if they were foreign corporations.[25]

[24] The overall results and conclusions of the Study performed by Richards for the years 1988-1991 are substantially applicable to the years 1982-1987. (Stip., Par. 66)

[25] By applying the two different franchise tax bases and rates to each of the sample domestic corporations, the size and structure of each corporation remains constant, with one franchise tax calculation made pursuant to the domestic statute and the other made pursuant to the foreign statute. Since the same corporations are involved and it is the difference in the franchise tax that is measured, the size and structure are identical, removing the distinction made in *Reynolds Metals*, 558 So.2d at 384-86, 389. (Study, p. 3)

For the years 1988-1991, the "as if foreign" franchise tax was more than 5 times the amount of average domestic franchise tax actually paid by the same domestic corporations. The percentage of discrimination ranged from 409.56% in 1988 to 509.15% in 1991, with the population of 40,000 Alabama domestic corporations paying between $38,877,183 in 1988 increasing progressively to $46,333,601 in 1991 less in Alabama franchise tax than they would have paid had they been treated as foreign corporations. (Study, pp. 1-2; Chart, p. 2)

Using the same sample data, the Study also determines the effective tax rates for domestic corporations based on their capital employed in Alabama. By statute (§ 40-14-41), foreign corporations pay Alabama franchise tax at the rate of $3 per $1,000 of capital employed in Alabama. By determining the effective domestic franchise tax rates, the ratio of domestic franchise tax to capital employed in Alabama by those domestic corporations, the effective rate domestic franchise rates are less than $.60. This means that the domestic corporations paid an annual franchise tax of a rate of less than $.60 per $1,000 [26] of capital employed in Alabama; or that foreign corporations paid franchise tax to Alabama at 5 times the effective rate paid by domestic corporations ($3/$.60 equal 5). (Study, pp. 16-17, Table 5, p. 18)

Based on the Department's position that the Alabama domestic shares tax [27] is a complementary tax to the franchise tax, Richards' Study did a similar comparison

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[26] $.589 for 1988; $.571 for 1989; $.565 for 1990; and $.497 for 1991.

[27] By statute, the domestic shares tax is not a tax liability of the domestic corporation, but is imposed on the shareholders of the corporation (§ 40-14-70(a)(2)). Department contends (erroneously) that since the domestic shares tax is almost always paid by the domestic corporation as a volunteer, that tax should be considered as a complementary tax to the corporate franchise tax which is imposed on the corporation.

between the total of franchise tax and shares tax paid by domestic corporations to the "as if foreign" franchise tax for the same domestic corporation. The Study shows that even combining the domestic franchise tax burden with the domestic shares tax burden, the "as if foreign" franchise tax calculated for the domestic corporations would be 2 times the amount of the total domestic tax. Or stated differently, the discrimination against the "as if foreign" corporation is approximately 100%—ranging from 109% in 1988 to 104% in 1991. (Study, p. 17; Table 6, p. 21) Additionally, the effective total tax rate of the domestic corporations when the domestic shares tax is included in the calculation of the tax burden to the domestic corporation is an effective total tax rate of $1.50 vs. $3.00 per $1,000 for foreign corporations, or domestic corporations have an effective tax rate that is only one-half of the tax rate for foreign corporations ($1.50/$3). (Study, p. 17; Table 5, p. 18)

The domestic shares tax calculation originally was made using a statewide weighted composite average millage rate provided by the Department. Richards made additional calculations using the maximum millage rate per county for the applicable tax year for each of the sampled domestic corporations. Although the use of the maximum county millage rate resulted in an over statement of the domestic shares tax,[28] the results were not changed substantially—the domestic corporations have an effective total tax rate of $1.64 vs. $3.00 per $1,000 for foreign corporations, or domestic corporations have an effective total tax rate that is slightly over one-half the tax rate for foreign corporations ($1.64/$3). (Richards' Supplemental Affidavit)

Based on the statistical Study, including the mean difference for the population of domestic corporations in

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[28] County-by-county maximum millage rate "would be a higher millage rate." (Broadhead Dep., pp. 159, 160)

Alabama for each of the years 1988-1991, Richards' Study concludes that discrimination does exist in favor of domestic corporations; that the population of domestic corporations in Alabama for each of those years paid less franchise tax in Alabama than they would have paid as foreign corporations and would have paid more in franchise taxes if they had been subject to the same franchise tax treatment as a foreign corporation under § 40-14-41 (5 times the tax paid as a domestic); and even if the domestic shares tax is considered a burden on the domestic corporation, substantial discrimination is established—the domestic corporations paid less total tax in Alabama than they would have paid as foreign corporations (one-half) and would have paid more in franchise taxes (twice the rate and amount) if they had been subject to the same franchise tax calculation or treatment as a foreign corporation under § 40-14-41. (Study, p. 22, Table 5, p. 18; Table 6, p. 21)

Based on Richards' personal knowledge and the Study, at least for the years 1988-1991, foreign corporations in Alabama, including the Taxpayers BellSouth companies and CSXT, have been victims of discrimination in the levy and payment of corporate franchise taxes in Alabama. Based on the data furnished and the results calculated therefrom, the conclusion is inescapable that the Alabama franchise tax scheme as applied has in fact resulted in discrimination in favor of domestic corporations and to the detriment of foreign corporations, including the Taxpayers. (Richards' Affidavit, pp. 4-5) The overall results and conclusions of the Study for the years 1988-1991 are substantially applicable to the years 1982-1987. (Stip., Par. 66)

Adele Howell Shepherd of BellSouth and James D. Hanford of CSXT, both in-house accountants with the corporate responsibility for the corporate franchise taxes for their respective taxpayers, furnished to Richards for use in his Study all computations from their manual collection of data from the Department's records, including domestic franchise tax returns, domestic shares tax returns and domestic corporate income tax returns for the sampled corporations. (Affidavits of Shepherd and Hanford)

The data and computations furnished Richards were obtained from the data furnished by the Department. Department furnished boxes of computer printouts and later computer tapes of all domestic and foreign franchise taxpayers and domestic shares taxpayers. However, this information furnished was insufficient to develop corporation-specific computations, and to review each of the domestic franchise tax returns and domestic shares tax returns and corporate income tax returns for each of the domestic corporations would have been an insurmountable task requiring the manual review of franchise tax returns, shares tax returns and corporate tax returns for more than 40,000 domestic corporations for each of the years 1988-1991. In order to develop corporation-specific data, Dr. Richards was employed to develop a scientific sampling methodology from which to conduct a study to determine whether the Alabama franchise tax scheme was discriminatory between domestic and foreign corporations. Dr. Richards was furnished with data received from the Department in the form of computer tapes and printouts, and along with Mr. Ray Beard performed a frequency distribution of domestic corporations based on a ratio of each corporation's net worth to its total par value of capital stock. Based on the frequency distribution, Dr. Richards stratified the domestic corporation population for each year into 7 groups (the seventh stratum containing only Alabama Power Company). A sample size of 25 corporations for each of the 6 stratum for each of the 4 years (1988-91) was determined by Dr. Richards to present a statistically valid stratified random sample of Alabama domestic corporations; however, to insure the sample size requirement, Dr. Richards instructed Mr. Beard to draw a random sample of 100 corporations for each of the 6 strata

for each year. The distribution of the domestic corporations within the sample and by stratum is shown in Tables 2a-2c of the Study. (Affidavits, Shepherd and Hanford)

Based on the random sample drawn, Shepherd and Hanford manually pulled and had copied the domestic franchise tax returns, domestic shares tax returns and domestic income tax returns for each of 1,078 domestic corporations to complete the corporation-specific data for the entire sample population of domestic corporations. (Shepherd Affidavit, p. 8, Hanford Affidavit, p. 4) Shepherd and Hanford recorded the data and had performed the calculations based on the data contained therein of an "as if foreign" franchise tax liability with respect to each of these domestic corporations. The methodology developed to compute an "as if foreign" franchise tax liability was accurate and valid for the purpose of establishing a comparison between the domestic franchise tax as actually paid by the sample corporations and the "as if foreign" franchise tax liabilities of the same corporations. Both the methodology employed was proper and the result of the methodology was accurate. (Shepherd Aff., Par. 12, p. 20)

In developing the data, Shepherd and Hanford used the property allocation factor as the basis for the calculation of capital employed in Alabama. The total value of the corporation's property was obtained from the balance sheet and the property located outside Alabama was obtained from the domestic shares tax return, and subtracted from the book value of the total property. The remainder was Alabama property and was divided by the book value of the total property to obtain an apportionment or allocation percentage factor. (Shepherd Affidavit, *Apportionment*, pp. 17-18)

In developing the domestic shares tax, the computation was performed using the maximum millage rate in a county for the applicable tax year. Another computation was made using a statewide weighted composite average

millage rate provided by the Department. (Shepherd Affidavit, pp. 19-20) The Department's statewide average millage rate per county was used in the calculation set forth in Tables 5 & 6 of Richards' Study. Richards did additional calculations based on the county maximum millage rate, which produced substantially the same results. (Richards' Supplemental Affidavit)

Ernest Broadhead, Chief, Franchise Tax Division, Alabama Department of Revenue, upon review of the Richards' Study and the methodology of calclulating an "as if foreign" liability concluded that the sample should reveal an accurate comparison of the domestic corporation and itself as "as if foreign" corporation with the 1-factor formula (property) for allocation. Broadhead agreed that the results of the Richards' Study paralleled very closely the conclusions and results he made in his own studies, both in 1983 and 1988, and that it is a reasonable conclusion that from this study and his own studies on the basis of domestic franchise tax vs. foreign franchise tax in Alabama, the same corporation pays a substantially larger amount of franchise taxes if it is taxed on an "as if foreign" basis vs. a domestic basis. If the comparison is restricted to franchise tax only, there is unequal treatment with regard to the tax laws in Alabama between domestic and foreign corporations; and regarding those same corporations, if the domestic shares tax paid by a corporation is added to what was paid as domestic franchise tax (domestic franchise tax plus domestic shares tax), the sum of those figures would be the total tax the corporation has paid (whether it was required to pay it or not), and if the Study showed that the "as if foreign" franchise tax exceeded by two-fold the total amount of domestic franchise tax plus domestic shares tax for the same corporation, a foreign corporation would be paying a greater pro rata portion, approximately twice as much as between domestic franchise tax plus domestic shares tax and "as if foreign" franchise tax. (Broadhead Dep., pp. 97-100)

In his 1983 study, Broadhead used the same property factor for the purpose of allocating capital employed in Alabama. (Broadhead Dep., p. 103) Broadhead used the value of property employed in Alabama to develop the allocation factor, which is an accurate allocation factor insofar as it can be computed from the actual records and books of the domestic corporations, including tax returns. (Broadhead, p. 85-86) Broadhead did not quarrel with the accuracy of using the property factor as the sole factor, except that since it is taken from the shares tax return, the shares tax property factor is as of October 1 and the franchise tax is as of January 1, "theoretically they could be a little apart." (Broadhead, Dep., pp. 103-105)

Broadhead's 1983 study related primarily to the differences between the domestic franchise tax levied and the foreign franchise levied pursuant to their respective statutes, in which study the "as-if foreign" franchise tax was computed for the domestic corporations using the domestic financial statements and applying the foreign tax base and foreign tax rate set forth in § 40-14-41. The computation showed the amount of tax that would have been paid by the domestic corporations if they were in fact filing as foreign corporations. Based upon this comparison, the franchise tax paid by the domestic corporation on an "as if foreign" basis was substantially greater for the same corporations taxed as if foreign rather than domestic corporations. The "as if foreign" projected tax was 8 to 1 greater than the actual domestic franchise tax paid.[29] The use of a 100% allocation factor in that study to calculate the "as if foreign" franchise tax was not a

[29] In 1983, the franchise tax rate on domestic corporations was $3 per $1,000 applied to the par value of capital stock. Commencing in 1984, the domestic franchise tax rate was raised and has remained at $10 per $1,000, while the foreign franchise tax rate remained at $3 per $1,000. Despite the increase in the franchise tax rate, the discrimination remains at a ratio of 5 to 1. (Study, pp. 16-17, Table 5, p. 18)

significant factor and did not have any substantial effect on the comparative conclusion because the substantial majority of the capital being employed by domestic corporations would in fact be employed in Alabama overall. (Broadhead Dep., pp. 69-74; Taxpayers Exhibit 4)

In 1983, legislation was proposed to equalize the tax burden between domestic and foreign corporations, using the same tax base—capital employed in Alabama—and the same tax rate for both domestic and foreign corporations. At that time, Broadhead felt in "a lot of cases" the tax burden was unequal and in favor of domestic corporations to the detriment of foreign corporations. The average tax paid by the foreign corporations was greater than for domestic corporations. The legislation as initially proposed did not pass; instead of a hurriedly prepared legislative bill increasing the tax rate on domestic corporations from $3 per $1,000 to $10 per $1,000 and increasing the minimum tax from $25 to $50 was passed by the Legislature in 1983,[30] effective for the 1984 tax year. The purpose of this legislation was to generate more tax dollars to be paid by domestic corporations to tend to equalize the tax burden. This increase did not equalize the tax burden between domestic and foreign corporations as to the average tax paid by each. (Broadhead Dep., pp. 10-15)

In 1988 or 1989, a similar study comparing the actual total tax paid by the domestic corporations for the year 1988 with its "as if foreign" franchise tax, which used a sample of 143 corporations, 99 of which are domestic and 44 are foreign corporations. In making the "as if foreign" calculations, the Department had and utilized the actual allocation factor. This study (Taxpayers' Exhibit 5, Broadhead Dep.) showed the 99 domestic corporations by number, the par value of the capital stock, the unallocated capital employed, the actual allocation percentage, the total 1988 taxes paid by the domestic, including

[30] Act 83-745, Acts of Alabama 1983.

franchise, permit, domestic shares tax, license and permit and the "as if foreign" franchise tax and the difference by each corporations in comparing the total. The total tax paid by these 99 domestic corporations as domestics (franchise, shares and permits) was $382,969 compared to the total "as if foreign" franchise tax calculated on the actual allocation percentages was $7,690,108, with the same corporations paying on "as if foreign" franchise tax basis, $7,344,331 more in franchise tax than the total tax burden paid by that same domestic corporation. (Broadhead Dep., pp. 74-79; Taxpayers' Exhibit 5)

Methodology employed in the 1988-89 study was proper. The information was taken from the Department's records, including tax returns, and the actual amount of taxes paid as a domestic corporation was compared with the "as if foreign" franchise tax on capital employed in Alabama computed by using the actual allocation percentage. The allocation factor used was computed from the actual records and books of the domestic corporations, including their tax returns, and was an accurate allocation factor. (Broadhead Dep., pp. 85-86)

By comparing the same corporations as domestic and "as if foreign," any size discrepancy is eliminated because it is the same corporation. The use of the allocation percentages of capital employed in Alabama is the proper way to determine "as if foreign" tax base, which eliminates any objection that there was not an allocation because the allocation factor furnished by the Department was used. The data contained in Taxpayers' Exhibit 4, attachments B and C (Broadhead Dep.) is the data Department drew and collected for use in the 1988-89 study and is appropriate and proper data which employed the proper allocation factor. The resulting comparison of the domestic corporations as is and applying the proper allocation factor show a neutral relative amount of tax that is being paid by that corporation depending on whether it is taxed as a domestic or foreign corporation. (Broadhead Dep., pp. 80-81)

Taxpayers' Exhibit 8 (Broadhead Dep.) is a computer printout spread sheet prepared by the Department (and furnished to the Taxpayers) showing a comparison of 11 foreign corporations for the tax years 1988 through 1991, which shows par value, book value, stockholders' equity and capital employed in Alabama with the calculation of the tax due. By comparison of the foreign corporation designated 850001 calculated as if a domestic corporation would have had a par value tax base of $3,298 and paid a minimum of $50 tax for each of the years 1988-1991 as compared to the maximum tax of $25 paid as a foreign corporation. Corporation numbered 8500010 paid for the years 1988 through 1991, respectively, a foreign franchise tax of $1,565, $2,295, $1,877 and $2,025 as a foreign corporation, but as a domestic corporation, it would have paid the minimum tax of only $50 in each of those years based on the $1,000 par value of its stock. (Broadhead Dep., pp. 87-93)

With regard to the differential between domestic franchise tax and foreign franchise tax, Broadhead did not know of any legitimate state purpose of having a different tax base; nor of any legitimate state purpose that would justify a disapportionate burden of franchise between domestic corporations and foreign corporations; nor of any services which the State or any of its agencies provide foreign corporations not provided to domestic corporations; nor of any substantial cost incurred regarding foreign corporations that the State does not incur with regard to domestic corporations; nor of any rational basis as to why foreign corporations are taxed differently than domestic corporations other than that it is the law of Alabama. The foreign levy is more complex because it contains the elements of debt, accelerated depreciation, deferred taxes, surplus and retained earnings, and the interpretation of those capital components, which causes the tax return to be more complex and more costly to process and enforce than against a domestic corporation. If the foreign fran-

chise tax were done on a straight-out equity capital employed within the State, it would be no more complex than the domestic tax return would be. (Broadhead Dep., pp. 106-109)

Taxpayers employed as a tax accountant expert, Wayne White, Certified Public Accountant and partner in the firm of Arthur Andersen & Co. in its Birmingham office, who has been a practicing certified public accountant in Alabama with more than 20 years experience in Alabama state taxation of corporations, including domestic and foreign franchise taxes and corporate income taxes which are levied on the corporation and ad valorem taxes imposed on the shares of capital stock owned by shareholders of domestic and foreign corporations. White for more than 20 years has been regularly engaged by corporate clients to represent them in connection with Alabama taxation and before the Alabama Department of Revenue and worked extensively with Alabama state taxation of corporations. (White Affidavit, Pars. 1-2)

Based on his experience, the Alabama franchise tax scheme discriminates in favor of domestic (in-state) corporations to the detriment of foreign (out-of-state) corporations which do business in Alabama. The discrimination in favor of domestic corporations results primarily from the discriminatory differential treatment in the tax base. By statute—§ 40-14-40—the domestic franchise tax is levied "based on its capital stock," for which the Legislature has provided no further definition nor guidelines upon which to determine the tax base. The Department, without any statutory basis, has utilized and applied "par value" of capital stock as the domestic franchise tax base without legislative definition, standards or directions.

Domestic franchise taxes are, without any statutory basis, levied on a tax base of "par value" of capital stock of a domestic corporation (except where the stock is no-par, "stated value" is the tax base). Par value has no relationship to the actual value of the corporation's capital

stock. Domestic corporations can, and do, arbitrarily set and reduce the par value of the capital stock. Alabama no longer has a minimum capital requirement, and shares may have any par value or no-par value; and a "no-par" stock corporation could be recapitalized utilizing "par stock" to reduce domestic franchise taxes.

By contrast, foreign franchise taxes are levied under § 40-14-41 on a tax base of "the actual amount of capital employed in this state," consisting of the real or actual value of the corporation's capital stock, including surplus and retained earnings, plus long-term debt, certain related-party debt and accelerated depreciation. The Department has added an additional component by requiring the inclusion of "deferred taxes" (not included in the statute) within the total capital of a foreign corporation.

By virtue of the difference in the tax base, domestic corporations are undertaxed based on the improper application of the domestic franchise tax statute, resulting in foreign corporations paying their unfair share of the Alabama franchise tax burden. (White Affidavit, Par. 3-4) White had reviewed the Richards' Study and the methodology and opined that the methodology and Study are reasonable and reasonably reflect the computation of the "as if foreign" franchise tax liability for domestic corporations in Alabama, including the use of the property factor for allocating "capital employed" in Alabama. Based upon his experience, the results of Dr. Richards' Study confirmed White's own analysis and opinion that the Alabama franchise tax scheme discriminates in favor of domestic corporations and to the detriment of foreign corporations. (White Aff., Par. 7, pp. 9-10)

The amount of foreign franchise tax paid pursuant to § 40-14-41 by Taxpayers as foreign corporations and the amounts of refund claimed by each Taxpayer for each of the taxable years is set forth in the Statement of the Case, p. 6.

APPENDIX D

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Case No. CV-89-2600 (with consolidation of
CV-90-1591, CV-90-1711, CV-91-397 and CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Case No. CV-90-2555 (with consolidation of
CV-90-2556, CV-90-2557, CV-90-2558 and CV-91-2151

CSX TRANSPORTATION, INC.,
Plaintiff

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Consolidated as CV-89-2600-G

STIPULATED FACTS

1. Taxpayers, CSX Transportation, Inc. and all of its predecessor companies (collectively "CSXT") and South Central Bell Telephone Company and its successor by

merger, BellSouth Telecommunications, Inc. ("South Central Bell" or "South Central"), and BellSouth Corporation, BellSouth Services, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., BellSouth Products, Inc., Alabama Cellular Services, Inc., Sunlink Corporation and TechSouth, Inc. and all of their predecessor companies (collectively "BellSouth Companies"), are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to Ala. Code § 40-14-41(a).

2. For the purposes of Alabama franchise tax, CSXT, South Central Bell and BellSouth Companies are and each of their predecessor companies was a foreign corporation by reason of their state of incorporation being other than Alabama.

3. A foreign corporation, for the purposes of Alabama franchise tax, is any corporation under the laws of any state other than Alabama—"organized under the laws of any other state, nation or territory. . . ." Ala. Code § 40-14-41(a).

4. A domestic corporation, for the purposes of Alabama franchise tax, is any corporation organized under the laws of Alabama—"every corporation organized under the laws of this state. . . ." Ala. Code § 40-14-40.

5. All foreign corporations, including CSXT, South Central Bell and BellSouth Companies are required to file a franchise tax return and are required to pay Alabama franchise tax as a foreign corporation pursuant to Ala. Code § 40-14-41. Each foreign corporation doing business in Alabama pays franchise tax to the State of Alabama in an amount which is determined by applying the tax rate of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to statute, the amount of capital employed against which this tax rate is multiplied is the total actual value of the following items of capital employed by that foreign cor-

poration in the State of Alabama, subject to the exclusions and deductions from the tax base as set forth in Ala. Code § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central Bell and CSXT, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

The Department required on the foreign franchise tax return that deferred income taxes be included as a separate item in the tax base.

6. The Alabama franchise tax is imposed upon foreign corporations pursuant to Ala. Code § 40-14-41 for the privilege of doing business within the State of Alabama.

7. Art. XII, § 232, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state."

8. Art. XII, § 232, Constitution of Alabama of 1901, does not define "capital employed in this state."

9. The Alabama franchise tax imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 is computed by applying the tax rate of $10 per $1,000 to the amount of the par value of the capital stock of the corporation with "par value" capital stock and to the amount of the stated value of the capital stock of the corporation with "no-par" capital stock.

10. Art. XII, § 229, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock."

11. The tax base used for the Alabama domestic franchise tax does not include the book value or the market value of the domestic corporation's capital stock.

12. The Alabama franchise tax imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations is not computed by applying the applicable tax rate multiplied by the book value or market value of the capital stock of the domestic corporation.

13. The tax base upon which Alabama franchise tax is imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations does not include surplus and undivided profits, long-term debt, the amount of certain related party debt, or the accelerated depreciation of the domestic corporation, or deferred taxes, which are not factors in determining the amount of franchise tax to be paid by a domestic corporation.

14. The tax base of foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid by foreign corporations pursuant to Ala. Code § 40-14-41, includes the value of items of capital not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid by domestic corporations pursuant to Ala. Code § 40-14-40.

15. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of corporate existence in and under the laws of Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40.

16. "Capital stock" upon which tax base domestic corporations pay Alabama franchise tax is not defined in

either Art. XII, § 229, AL. CONST. 1901 or Ala. Code § 40-14-40, to require the levy of the domestic franchise tax base solely upon the par value or stated value of a domestic corporation's capital stock.

17. Department and Commissioner have for the purposes of determining the franchise tax levied on a domestic corporation pursuant to Ala. Code § 40-14-40 based the levy of such tax solely upon the par value of the capital stock of each domestic corporation with "par value" capital stock and to the amount of the stated value of the capital stock of the corporation with "no-par" capital stock.

18. Department and Commissioner for the purposes of determining the franchise tax on foreign corporations, including CSXT, South Central Bell and BellSouth Companies, pursuant to Ala. Code § 40-14-41 have based the levy on the value of capital employed in the State of Alabama, including the outstanding capital stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation. The Department required on the foreign franchise tax return that deferred income taxes be included as a separate item in the tax base.

19. The par value of shares of capital stock of a domestic corporation does not represent the book value or market value of the capital stock of the domestic corporation as a going concern.

20. The stated value of shares of capital stock of a domestic corporation does not represent the book value or market value of the capital stock of the domestic corporation as a going concern.

21. A corporation organized under the laws of Alabama may control the amount of its domestic franchise tax levied pursuant to Ala. Code, § 40-14-40, by assigning as the "par value" or "stated value" of its capital stock any value selected by it.

22. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action incorporate with a minimal amount assigned as "par value" and may thereafter increase or decrease the "par value" of its capital stock.

23. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action incorporate with a minimal amount assigned as "stated value."

24. A domestic corporation can reduce the amount of franchise tax paid by it pursuant to Ala. Code § 40-14-40 by reducing the par value of its capital stock.

25. A foreign corporation doing business in the State of Alabama cannot reduce the amount of Alabama franchise taxes paid by it pursuant to Ala. Code § 40-14-41 by reducing the par value of its capital stock or the stated value of its capital stock.

26. A foreign corporation doing business in the State of Alabama cannot reduce the actual amount of its capital employed in Alabama by reducing the par value of its capital stock or the stated value of its capital stock.

27. CSXT, South Central Bell and BellSouth Companies and other foreign corporations who engage in business within Alabama are required to pay taxes on the tax base set forth in Ala. Code § 40-14-41 by virtue of the fact that they are organized in a state other than the State of Alabama.

28. Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to Ala. Code § 40-14-40 based on a tax base of the "par value" of the shares of capital stock of domestic corporations or the "stated value" for domestic corporations with no-par stock, while levying the Alabama franchise tax on CSXT, South Central Bell and BellSouth Companies and other foreign corporations engaging in business within Ala-

bama pursuant to Ala. Code § 40-14-41, based on the value of capital employed in the State of Alabama by each of the foreign corporations which tax base includes the actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation and deferred taxes, subject to the exclusion and deductions set forth in § 40-14-41(d), and subject to the maximum tax base for public utilities and transportation companies, such as CSXT and South Central Bell Telephone Company, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama.

29. The Department and Commissioner use "par value" of capital stock as the sole tax base for domestic corporations which have par value stock, and "stated value" of capital stock as the sole tax base for domestic corporations which have no par value capital stock.

30. For the tax year 1991, each of the following BellSouth Companies timely filed its foreign franchise tax return for 1991 and on or before March 15, 1991, paid under protest the foreign franchise taxes calculated by it to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

South Central Bell	$5,241,572.00
BSResources	2,720.00
BSFinancial	28,538.90
BSServices	206,333.00
BAPCO	75,412.00
AlaCell	64,880.00
BSProducts	2,753.00
TechSouth	3,147.00
Sunlink	24,108.00

31. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the Complaint in CV-91-1079-Th is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the estimated payment of 1991 foreign franchise taxes paid by each of these Taxpayers was made under protest.

32. All of the statements, allegations and amounts of foreign franchise taxes paid set forth in Paragraph 7 of the Complaint for declaratory judgment and refund of taxes paid under protest in Civil Action CV-91-1079-Th, together with all exhibits attached to said complaint are true, correct and accurate.

33. For the tax year 1990, South Central timely filed its foreign franchise tax return and the Department entered a final assessment of foreign franchise taxes in the amount of $5,409,568.03, and on August 28, 1990, South Central timely perfected its appeal and contemporaneously paid the Department the amount of $5,411,198.31 in full payment of said final assessment plus interest before the same became delinquent.

34. The copy of Exhibit A attached to the complaint in CV-90-1711-P is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1990 foreign franchise taxes calculated by the Department to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41.

35. For the tax year 1990, each of the following BellSouth Companies timely filed is foreign franchise tax return for 1990 and on or before June 15, 1990, paid under protest the foreign franchise taxes calculated by it to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

BS Corp	$ 17,495.06
BSServices	205,524.69
BSFinancial	16,908.24
BAPCO	71,860.77
BSResources	4,575.77
AlaCell	45,068.83
Sunlink	37,952.33
TechSouth	3,610.25

36. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the complaint in CV-90-1591-G is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the payment of the 1990 foreign franchise taxes paid by each of these Taxpayers were made under protest. Each of the copies attached as Exhibit "B" to the complaint in CV-90-1591-G is a true and correct copy of the letter from the Department acknowledging receipt of each of the 1990 franchise tax payments as a payment under protest.

37. For the tax year 1989, South Central timely filed its foreign franchise tax return for 1989, and the Department made a final assessment against South Central for 1989 foreign franchise taxes in the amount of $5,219,546 and on December 15, 1989, South Central paid to the Department the amount of $5,219,546 in full payment of said final assessment before the same became delinquent and contemporaneously timely filed its Notice of Appeal.

38. Each of the Exhibits "A" through "E", inclusive, attached to the complaint in CV-89-2600-G is a true and correct copy of the items set forth and defined in the complaint.

39. For each of the tax years 1986, 1987 and 1988, South Central timely filed its foreign franchise tax return

and paid foreign franchise taxes calculated by it to be due for each of the years in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

Year	*Amount of Tax Paid*	*Date Tax Paid*
1986	$4,952,692.00	August 25, 1986
1987	$4,995,844.00	July 16, 1987
1988	$4,927,214.00	August 16, 1988

40. All of the statements, allegations and amounts of foreign franchise taxes paid in Paragraphs 3, 4 and 5 of the complaint and petition for judicial review in Civil Action CV-91-397-G, together with Exhibits "A", "B" and "C" attached to said complaint, are true, correct and accurate.

41. For the tax year 1991, CSXT filed its foreign franchise tax return and the Department made a final assessment against CSXT for 1991 foreign franchise taxes in the total amount of $715,058.14 representing franchise tax in the amount of $571,326.67 with a penalty in the amount of $117,376.20 and interest in the amount of $26,355.27. CSXT timely perfected its appeal and filed its supersedeas bond. On August 31, 1992, CSXT paid unto the State the total amount of $649,017.98 representing payment in full of the tax assessed in the amount of $571,326.67 plus interest in the amount of $77,691.31 through August 31, 1992, and the State waived and remitted all penalties for the tax year 1991, and accepted the foregoing payment as payment in full of the final assessment of, and the liability for, foreign franchise taxes levied against CSXT for the year 1991 plus all interest due thereon, subject to the right of CSXT to a refund of all or any portion of said taxes and interest.

42. The copy of Exhibit "D" attached to the complaint in CV-91-2151-G is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1991 foreign franchise taxes calculated

by the Department to be due for the year 1991 in accordance with the formula set forth in Ala. Code, § 40-14-41.

43. For the tax year 1990, CSXT filed its foreign franchise tax return for 1990, and the Department made a final assessment against CSXT for 1990 foreign franchise taxes in the amount of $662,737.62 representing franchise tax in the amount of $573,792.00 with a penalty in the amount of $46,406.41 and interest in the amount of $42,539.21. CSXT timely perfected its appeal and contemporaneously therewith filed its supersedeas bond before the final assessment became delinquent. On August 31, 1992, CSXT paid unto the State the total amount of $714,935.68 representing payment in full of the tax assessed in the amount of $573,792.00 plus interest in the amount of $141,143.68 through August 31, 1992, and the State waived and remitted all penalties for the tax year 1990, and accepted the foregoing payment as payment in full of the final assessment of, and the liability for, foreign franchise taxes levied against CSXT for the year 1990 plus all interest due thereon, subject to the right of CSXT to a refund of all or any portion of said taxes and interest.

44. The copy of Exhibit "E" attached to the complaint in CV-90-2556-G is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1990 franchise taxes calculated by the Department to be due for the year 1990 in accordance with the formula set forth in Ala. Code, § 40-14-41.

45. For the tax year 1989, CSXT filed its foreign franchise tax return and Department entered a final assessment of foreign franchise taxes against CSXT in the amount of $800,324.17 representing franchise tax in the amount of $574,252.31 with a penalty in the amount of $115,353.92 and interest in the amount of $110,717.94. CSXT timely perfected its appeal and contemporaneously filed its supersedeas bond before the same became delinquent. On August 31, 1992, CSXT paid unto the State

the total amount of $781,556.10 representing payment in full of the tax assessed in the amount of $574,252.31 plus interest in the amount of $207,303.79 through August 31, 1992, and the State waived and remitted all penalties for the tax year 1989, and accepted the foregoing payment as payment, in full of the final assessment of, and the liability for, foreign franchise taxes levied against CSXT for the year 1989 plus all interest due thereon, subject to the right of CSXT to a refund of all or any portion of said taxes and interest.

46. The copy of Exhibit "E" attached to the complaint in CV-90-2555-G is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1989 foreign franchise taxes calculated by the Department to be due for the year 1989 in accordance with the formula set forth in Ala. Code § 40-14-41.

47. For the tax years 1986, 1987 and 1988, CSXT timely filed its foreign franchise tax return and paid foreign franchise taxes for each of the years in accordance with the formula set forth in Ala. Code, § 40-14-41, as follows:

Year	*Amount of Tax Paid*	*Date Tax Paid*
1986	$555,951.00	November 14, 1986
1987	$557,066.00	August 13, 1987
1988	$570,472.00	August 23, 1988

Petition for refund was timely filed for each of the years 1986, 1987 and 1988, and the appeal from final notice of the denial of said foreign franchise tax refunds was timely filed.

48. All of the statements, allegations and amounts of foreign franchise taxes paid as set forth in Paragraphs 3 and 4 of the complaint and petition for judicial review in CV-90-2557-G, together with Exhibits "A", "B" and "C" attached to said complaint are true, correct and accurate.

49. For each of the tax years 1982, 1983, 1984 and 1985, CSXT or its predecessors timely filed its foreign franchise tax return and paid foreign franchise taxes for each of the years in accordance with the formula set forth in Ala. Code, § 40-14-41, as follows:

Year 1982	Seaboard Coast Line Railroad Company	$108,333.00
Year 1982	Louisville & Nashville Railroad Company	$316,667.00
Year 1983	Seaboard System Railroad, Inc.	$396,319.00
Year 1984	Seaboard System Railroad, Inc.	$461,374.00
Year 1985	Seaboard System Railroad, Inc.	$578,544.00

Petition for refund was timely filed for each of the years 1982, 1983, 1984 and 1985, and the appeal from final notice of the denial of said foreign franchise tax refunds was timely filed.

50. All of the statements, allegations and amounts of franchise taxes paid as set forth in Paragraph 3, 4 and 5 of the complaint and petition for judicial review in Civil Action CV-90-2558-G, together with exhibits "A", "B" and "C" attached to said complaint are true, correct and accurate.

51. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included surplus and undivided profits.

52. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included long-term debt.

53. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included related party debt.

54. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included accelerated depreciation.

55. After September 8, 1961, upon the passage of Act No. 912, the following factors, in addition to outstanding capital stock, have constantly remained a part of the foreign franchise tax base:

(a) surplus and undivided profits;

(b) long-term debt;

(c) related party debt; and

(d) accelerated depreciation.

56. "Par value" of the corporate stock of domestic corporations has been used by the Department during the tax years 1982 through 1991 as the tax base upon which domestic franchise taxes are applied or calculated.

57. "Par Value" does not appear in the statute—Ala. Code, § 40-14-40—levying Alabama franchise tax on domestic corporations.

58. The statute levying Alabama franchise tax—Ala. Code, § 40-14-40—on domestic corporations does not require the use of other than actual value of the corporate stock of domestic corporations.

59. A change in par value of capital stock of a foreign corporation will not have any effect on its Alabama franchise tax base or the amount of Alabama foreign franchise tax levied on it.

60. The statute levying Alabama franchise tax on domestic corporations does not refer to actual book value of the corporate stock of domestic corporations.

61. The franchise tax base for foreign corporations is increased as it retains profits or accumulates surplus.

62. The franchise tax base for foreign corporations is increased as it utilizes accelerated or other method of depreciation so that its depreciation reserve exceeds depreciation computed on the basis of the useful life of its depreciable property.

63. An increase in indebtedness will increase the franchise tax base for foreign corporations if the increase indebtedness is long term or involves debt to a parent or subsidiary which is not also required to pay a franchise tax in Alabama.

64. The tax base utilized by the Department for foreign corporations includes deferred taxes and the tax base is increased as deferred taxes of foreign corporation increase.

65. In the collection of foreign franchise taxes, the Department of State of Alabama can perfect a lien on or levy against the "capital employed in this state" of foreign corporations.

66. The overall results and conclusions of the study performed by Dr. Larry Richards for the years 1988-1991 are substantially applicable to the years 1982-1987.

67. The total amount of foreign franchise tax on foreign franchise taxes collected for the following tax years:

Year	*Foreign Collections*
1990	$ 84,250,744.00
1991	$ 96,290,249.00
1992	$107,612,319.00

The franchise tax collected was distributed pursuant to § 40-14-43, *Code of Alabama 1975*, in the following proportions: General Fund, 77%; Public Welfare Trust Fund, 16.35%; County, 6.65%.

68. If the franchise tax levy against foreign corporations is invalidated and if the Court orders refunds to Taxpayers in this case, the State of Alabama could potentially be liable for foreign franchise tax refunds to all foreign franchise taxpayers for three years. In the event all foreign corporations become entitled to immediate payment of refunds of the total amount of the foreign franchise taxes paid for 1990-1992, the consequences to the State of Alabama would be significant and such refunds would have a substantial detrimental effect on state services provided from the general fund and the public welfare trust fund and services provided by the several counties.

CSX TRANSPORTATION, INC.; SOUTH CENTRAL BELL TELEPHONE COMPANY and its successor by merger, BELLSOUTH TELECOMMUNICATIONS, INC.; BELLSOUTH CORPORATION; BELLSOUTH SERVICES, INC.; BELLSOUTH FINANCIAL SERVICES CORPORATION; BELLSOUTH ADVERTISING & PUBLISHING CORPORATION; BELLSOUTH RESOURCES, INC.; BELLSOUTH PRODUCTS, INC.; ALABAMA CELLULAR SERVICES, INC.; SUNLINK CORPORATION; and TECHSOUTH, INC.

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for Plaintiffs

Of Counsel:

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101

STATE OF ALABAMA DEPARTMENT OF REVENUE and STAN MCDONALD As Commissioner of Revenue

By /s/ Ron Bowden
RON BOWDEN
Attorney for Defendants

Department of Revenue
Legal Division
P. O. Box 320001
Montgomery, AL 36132-0001

APPENDIX E

STEINER, CRUM & BAKER
Montgomery, Alabama 36101-0668

January 19, 1990

Judge William R. Gordon
Montgomery County Courthouse
Montgomery, Alabama 36192

Re: South Central Bell Telephone Company v. State of Alabama, Department of Revenue, Civil Action No. CV-89-2600-G

Dear Judge Gordon:

The foregoing is an appeal from an assessment against South Central Bell Telephone Company for 1989 foreign franchise taxes levied pursuant to § 40-14-41, Code 1975. The taxpayer has filed its complaint in order to comply with the Alabama Administrative Procedures Act. However, both the taxpayer and the State Department of Revenue desire that further proceedings with regard to this appeal be held in abeyance pending a final disposition of the *Reynolds* and *GMAC* cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U. S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated.

Accordingly, on behalf of the taxpayer and the Department, I hereby respectfully request that the foregoing appeal be placed on the administrative docket or otherwise held in abeyance pending further notification of the Court.

Respectfully submitted,

STEINER, CRUM & BAKER

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for South Central
Bell Telephone Company

WRB:mel
cc: Mr. Ron Bowden

APPENDIX F

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

Civil Action Case No. CV-89-2600
(With Consolidation of CV-90-1591,
CV-90-1711, CV-91-397 and CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

Civil Action Case No. CV-90-2555
(With Consolidation of CV-90-2556
CV-90-2557, CV-90-2558 and CV-91-2151)

CSX TRANSPORTATION, INC.,
Plaintiff,

vs.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

COURT REPORTER'S TRANSCRIPT
OF PROCEEDINGS
December 14, 1995
Montgomery County Courthouse
Courtroom 3-B

Before: THE HONORABLE WILLIAM R. GORDON
Circuit Judge

* * * *

[129] ADELE HOWELL SHEPHERD,

A witness, after having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BYARS:

Q. Please state your name and address.

A. My name is Adele Howell Shepherd and I reside in Atlanta, Georgia.

Q. And by whom are you employed and what capacity?

A. Since 1984 I have been employed by BellSouth Corporation as the director over taxes. In that capacity I'm responsible for research, audit and compliance for taxes other than income taxes for BellSouth Corporation in its unregulated subsidiaries. My staff files the Alabama franchise tax return for those companies.

Q. Really for most BellSouth Companies?

A. Yes.

Q. Please state your educational background.

A. I received a bachelor's degree, a B. A. degree from Randolph [130] Macon Woman's College in 1967, a Master of Science degree from Boston University in 1972, and a Master of Professional Accountancy degree from Georgia State University in Atlanta in 1974.

Q. After getting your master's at Georgia State, did you take and pass the CPA exam?

A. I did.

Q. When was that?

A. 1975.

Q. Please give us your employment background.

A. Since 1972, I have been employed by various Bell Companies. I started work for Southern Bell. After I

finished my master's and passed the CPA exam, I transferred into the tax department at Southern Bell in 1976. In 1978 I went into internal auditing where I had an assignment to work on the intercompany audit of companies that file federal income tax returns consolidated with AT&T. I subsequently transferred to AT&T from the federal income tax audit. In 1982 I came back to Southern Bell as district manager of taxes where I was responsible for taxes other than income taxes and property taxes for Southern Bell. That would be things like sales tax, gross receipts tax, intangible taxes, franchise taxes, that type of thing.

Q. Does that include the Alabama franchise tax?

A. Uh-huh.

[131] Q. When did you first become aware of the litigation that's known as the *White* case or *White v. Reynolds Metals Company*?

A. After the Montgomery Circuit Court had resolved the issues and issued a judgment.

Q. Okay. You were the person involved and responsible for Alabama franchise taxes; is that correct, at that time?

A. For the companies.

Q. Yes. And at that time was there anyone within the company as far as you know that was aware of that litigation until after it was decided by this Court?

A. No.

Q. Let me ask you this. With respect to BellSouth, each of these questions will be with respect to BellSouth or any affiliated companies that are the taxpayers or any of the affiliates, are any of them a party to the *White* litigation?

A. No.

Q. Any aligned, affiliated, associated or connected in any way with the taxpayers in that case Reynolds Metals Company, General Motors Corporation, General Motors Acceptace Corporation or GMAC Leasing Corporation?

A. No.

Q. Did any of the Bell Companies participate in the litigation at all?

A. No.

Q. Did any of them authorize any of the taxpayer litigants in [132] the White case to represent their interest in the litigation?

A. No.

Q. Did any of them share in any of the legal or other expenses of the taxpayer litigants associated with the prosecution of the White case?

A. No, they didn't.

Q. Did any of them participate or have an opportunity to be present or present evidence or arguments in any challenge of the Alabama franchise tax levied upon them as foreign corporations?

A. No.

Q. Did any of them control or take an active part in the conduct of the White case?

A. No, they did not.

Q. Were any of them aware of the thrust of the challenges made in the White litigation until after the decision of this Court?

A. They were not.

Q. Ms. Shepherd are you aware of the operations of the BellSouth Companies that are parties to this?

A. I am.

Q. Are you also aware of the Alabama franchise tax returns of all the BellSouth taxpayers who are litigants in this litigation?

* * * *

[188] JAMES D. HANFORD

A witness, after having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BYARS:

Q. Would you please state your name and address?

A. My name is James D. Hanford. I reside in Jacksonville, Florida.

Q. By whom are you employed and in what capacity?

A. I'm employed by CSX Corporation in the capacity of senior director of state income and sales taxes.

Q. How long have you had that job, and what were the responsibilities?

[189] MR. BYARS: Yes, sir?

THE COURT: I am having a little trouble hearing him.

Q. Speak up, please, Mr. Hanford. How long have you served in this position and what are your main responsibilities?

A. I have served in this position since October 1, 1986. My principal functions are planning, compliance and audits associated with non-property state taxes, such as corporate income, franchise and sales and use tax for CSX Corporation and all of its related companies including CSX Transportation, Inc.

Q. CSX Transportation, Inc. is a taxpayer who is challenging in this case; is that correct?

A. Yes.

Q. Please state your education and employment background.

A. I earned a bachelor's degree from Northern Illinois University in 1974. I have been a certified public accountant since 1976. Prior to working for CSX Corporation, I was employed by the Bessemer Railroad in the capacity of manager of income taxes, responsible for all federal and state income tax matters for that company.

Q. How much experience have you had in the area of state taxation, and in particular Alabama franchise tax?

A. I have thirteen years of experience in the area of state taxation. Seven years of experience in the area of

state franchise taxes, including the Alabama franchise tax.

[190] Q. Are you familiar with the operations of CSXT or Transportation in Alabama and also its Alabama franchise tax returns?

A. Yes, I am. I'm familiar with CSXT in the sense that I filed a foreign franchise tax return in Alabama. During the time that I have been with CSX, I have been responsible for that filing. CSX is a corporation authorized to do business in Alabama and engages in interstate commerce.

Q. How long have you been involved in those filings?

A. I have been involved with the Alabama franchise tax filings since 1989.

Q. And were you also a participant in the preparation of the challenges to this particular franchise tax—this case?

A. Yes, I was.

Q. In connection with the challenges did CSX and other taxpayers employ an expert to assist them in a statistical study?

A. Yes, we employed Dr. Larry Richards the chairman of the Decision Sciences Department on School of Business for the University of Oregon who is an expert statistician and is very familiar with the planning and conduct of the statistical studies specifically in the area of taxation.

Q. What role did you plan in connection with this?

A. I was assigned to a team along with Adele Sheppard. And our principal duty was to gather data to be used by Dr. Richards [191] in performing his study in order to determine whether or not the Alabama franchise tax scheme discriminated against foreign corporations and in favor of domestic corporations.

Q. Did you participate with Adele Shepherd in the accumulation and recording of data taken from productions made by the State of Alabama?

A. Yes, I did.

Q. Were you and Adele Shepherd able to ascertain all the data elements required to compute an "as if" franchise tax liability for each and every domestic corporation?

A. No, we were not. We determined that to be impractical. When you look at the number of domestic corporations in Alabama, the number of tax returns that will need to be pulled and the data that would have to be accumulated, it was just an impossible task in our opinion.

Q. Did you resolve this by having Dr. Richards to design a scientific random sample?

A. Yes.

Q. Have you been here in the courtroom as the representative of CSXT and heard the testimony of Mrs. Adele Shepherd with regard to the procedure and methodology employed in the collection and development of data to support the analysis performed by Dr. Richards?

A. Yes, I have been in the courtroom representing CSX. And yesterday I listened to Adele Shepherd's testimony. And I [192] concur with her testimony in regard to our accumulation of data.

Q. In your professional opinion as a CPA, are the data collected and methodology used by you both accurate and appropriate?

A. Yes, that is my opinion.

Q. With regard to the White litigation, I will ask each of these questions with regard to CSX and any of its affiliated companies. Were any a party at any level to the litigation to proceedings in the Alabama courts that resulted in the Alabama Supreme Court decision in White against Reynolds Metals?

A. No.

Q. Did you participate in the litigation or in the development of the evidence at any level in that case?

A. No.

Q. Aligned, affiliated or associated or connected in any way with the taxpayer litigants in that case Reynolds

Metals Company, General Motors Corporation, General Motors Acceptance, GMAC Leasing Corporation?

A. No.

Q. Did you authorize any of the taxpayer litigants in the White case to represent the interest of CSXT in that litigation?

A. No.

Q. Share in any of the legal or other expenses of the taxpayer [193] litigants associated with the prosecution of the White litigation at any level?

A. No.

Q. Participate or have opportunty to be present or to present evidence and arguments in challenge of the Alabama franchise tax levied upon CSXT as a foreign corporation or upon those litigants as foreign corporations?

A. No.

Q. Control or take an active part in the conduct of the White litigation?

A. No.

Q. In your capacity as senior director of state taxes for CSX, were you responsible for the state franchise taxes, including Alabama, and the challenges to those taxes by CSX?

A. Yes.

Q. When did you first become aware of the White litigation challenging the Alabama franchise tax scheme?

A. I became aware of the White litigation when the Montgomery court—Montgomery County Circuit Court issued its decision in that case.

Q. Finally, I want to ask you a few questions about CSX Transportation demographics. What the the total assets and revenues of your company?

A. The total assets of CSX Transportation in Alabama are $838,000,000.00. The total revenues of the CSX [194] Transportation in Alabama is $270,000,000.00.

Q. How many people does CSXT, I will call it, employ in the state of Alabama?

A. The CSXT employs 1,118 employees in Alabama.

Q. What is the annual amout of capital expenditures of CSX Transportation in Alabama?

A. Our annual construction budget in Alabama is $20,000,000.00.

Q. And for 1994 what was the Alabama foreign franchise tax levied against CSXT?

A. $539,000.00.

Q. Mr. Hanford, has CSX considered the potential impact on the State of Alabama of pursuing its franchise tax lawsuit to a successful conclusion?

A. Yes, we have. We are aware of the State of Alabama's need to generate revenues in order to fund the operations of the State. But at the same time we feel that the taxes employed to generate that revenue should be equitable to all that are affected. We also are appreciative of the impact of this case on the State of Alabama. And CSX Transportation would like to be a good corporate citizen and pay its fair share of taxes in Alabama but no more than its fair share. In light of that, we have made it known that we would be willing to accept credits instead of cash refunds if this Court decides that refunds are appropriate in order to minimize the impact on the State and at the same time that would equalize the [195] franchise tax burden on foreign and domestic corporations in Alabama.

Q. When you say credit, is that credit against future tax liabilities?

A. Yes, sir, for a specific number of years.

MR. BYARS: That's all I have.

APPENDIX G

Ala. Code § 40-1-11 (1975) (repealed 1992) provided:

§ 40-1-11. Payment under protest—Authorized; procedure for recovery.

Whenever any taxpayer claims that any tax, except ad valorem taxes, levied under the provisions of this title as fixed by the officer authorized to collect same is excessive or is invalid, either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. The taxpayer shall commence an action against the officer for the recovery of such excessive or invalid tax, as the case may be, within 60 days after the payment thereof under protest, and unless such action is commenced within that period of time for the recovery of the amount of taxes claimed to be excessive or invalid, the taxpayer shall be deemed to have waived the payment of such taxes under protest and to have thereby become a voluntary taxpayer. If an action is filed for the recovery of any taxes paid under protest within the specified period of time and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in section 40-1-12. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 890; Acts 1943, No. 402, p. 369.)

Ala. Code § 40-1-12 (1975) (repealed 1992) provided:

§ 40-1-12. Same—Disposition of funds.

Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the state treasury, with notice to the treasurer that said sum of money was paid under protest by the identified taxpayer, and it shall be the duty of the treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected or the taxpayer abandons the recovery of the money by failure to bring an action within the period of 60 days after the payment thereof. The treasurer shall give notice to the comptroller that such funds are set up in a suspense account and are therefore not available for allotment, allocation or disbursement until the validity of the assessment and collection is determined by the court. If it is determined by the court, on an action brought by the taxpayer, that any portion of the taxes paid under protest was excessive or illegally assessed and collected, the comptroller shall issue his warrant upon the treasurer for a refund of such sum as may have been determined by the court to be excessive or invalid, and the remainder of such fund, if any, shall be allocated and disbursed as authorized by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 891; Acts 1943, No. 402, p. 369.)

Ala. Code § 40-1-34 (1975) (repealed 1992) provided:

§ 40-1-34. Refund on overpayment made directly to department of revenue.

Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such overpayment or erroneous payment.

Before any refund under this section can be made, the taxpayer, his heirs, successors or assigns shall file in duplicate a petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within three years from the date of such payment.

The department of revenue shall examine said petition and the records of the department of revenue, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the department of revenue, upon the evidence adduced, is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the comptroller stating the amount to be refunded by the state, the particular fund on which such warrant shall be drawn and forward to the comptroller a copy of the petition with the certificate attached, and if the comptroller shall be satisfied that the petition is in form required by law, he shall draw his warrant on the treasurer as hereinbefore provided for the amount certified to him by the department of revenue. (Acts 1931, No. 432, p. 527; Code 1940, T. 51, § 913; Acts 1951, No. 852, p. 1481, § 1.)

Ala. Code § 40-2-22 (1975) (repealed 1992) provided:

§ 40-2-22. Appeals from final assessments—Right; procedure generally; effect of final judgment.

Either the state or the taxpayer may appeal from any final assessment made by the department of revenue under any assessment required by law to be made by the department of revenue. If the appeal is by the state, such appeal shall be made by the attorney general filing the written notice with the secretary of the department of revenue and with the clerk or register of the circuit court of Montgomery county within 30 days after such assessment is made final. The department of revenue shall immediately give notice by certified or registered mail to the taxpayer of the filing of such appeal by the state. If any taxpayer against whom an assessment is made by the department of revenue under any assessment required by law to be made by the department of revenue is dissatisfied with the final assessment as fixed by the said department of revenue, he may appeal from said final assessment to the circuit court of Montgomery county or, in cases other than public utilities, to the circuit court of the county in which the taxpayer resides, if the taxpayer has within the state a permanent residence, at the option of the taxpayer, by filing notice of appeal with the secretary of the department of revenue and with the clerk or register of the circuit court of the county to which the appeal shall be taken within 30 days from the date of said final assessment made and entered on the minutes of the department as required by law and, in addition thereto, by giving bond conditioned to pay all costs to be filed with and approved by the clerk or register of the court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the same shall become delinquent; and, if such taxes are not paid before the same becomes delinquent, the court shall upon motion ex mero motu dismiss such appeal, unless at the

time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk or register of the court to which the appeal shall be taken in double the amount of the taxes payable to the state of Alabama, conditioned to pay all taxes, interest and costs due the state, county or any agency or subdivision thereof. In such appeals the party taking the appeal shall be styled the appellant and the party against whom the appeal is taken shall be styled the appellee. The assessment made by the department of revenue shall prima faci be correct, and where the appeal is taken by the taxpayer the burden shall be on the appellant to show that such assessment is incorrect. The circuit court or the supreme court of Alabama on appeal to it may, if it is of the opinion from all the evidence that the assessment as made is either too high or too low, fix the amount of such assessment. The court shall hear such appeals according to its own rules and methods or procedure so far as practicable and shall decide all questions both as to the legality of the assessment and the amount thereof. No court shall have the power to enjoin the collection of any taxes due on such assessment so appealed or to suspend the payment thereof. From the judgment of the circuit court, either the state or the taxpayer may appeal direct to the supreme court of Alabama, within 42 days from the entry of the judgment; the taxpayer shall give security for the cost of such appeal to be approved by the clerk or register of the circuit court from which the appeal shall be taken. If upon such appeal the assessment made by the department of revenue is reduced, the court, upon proof of payment of said tax, shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment, the amount of tax which was invalid or which was excessive both as to the amount paid to the state, counties, county boards of education, municipalities or other governmental agencies receiving any part of such taxes; and, upon presentation of a certified copy of the judgment to the comptroller, it shall be the duty of the

comptroller to draw his warrant on the treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the state, together with interest from date of payment, and such warrant of the comptroller shall be paid out of any funds in the treasury as a current obligation of the year in which said refund is ordered. Upon presentation of a certified copy of such judgment to the county commission of any county, or upon presentation of a certified copy of such judgment to a county board of education or to the city council or other governing body of any municipality, or upon presentation of a certified copy to the governing body of any other agency of the state which may have received any part of said tax erroneously paid as determined by the judgment, it shall be the duty of said county commission of the county, or the county board of education or the city council or other governmental body of a municipality, or of the governmental body of any other agency receiving any part of such taxes to draw its warrant on the treasurer of such county, school board, municipality or other agency in favor of the taxpayer for such amount of said tax as may have been erroneously paid to such county, school board, municipality or other agency, together with interest from date of payment. Such amounts shall constitute claims preferred over all other claims, and the respective treasurers are hereby required to refund such amounts received by said county, school board, municipality or other agency. In the event the judgment of the court shall fix an assessment greater than that appealed from when the taxpayer has paid the taxes on the assessment appealed from, the court shall fix and determine the amount of such excess, and the taxpayer and the sureties on his appeal bond shall be adjudged to pay the taxes due by reason of such increased assessment with interest from date of judgment, and the lien and priorities of the state and counties shall apply to such additional amount as in other cases. The court, in fixing the assessment, shall order the assessing authorities

to apportion the same and the collecting authorities to collect taxes thereon for the several taxing subdivisions in the manner provided by law. Where the taxpayer elects to make supersedeas bond and not to pay the taxes, the court in entering final judgment shall order that interest at the legal rate shall be paid on such assessment as finally made from the date that such taxes would have become delinquent on the original assessment. (Acts 1935, No. 194, p. 256; Acts 1936, Ex. Sess., No. 154, p. 172; Code 1940, T. 51, § 140.)

Ala. Code § 40-11-1 (1993) provides:

§ 40-11-1. Enumeration of subjects of taxation.

(a) As used in this section the following terms shall have the meanings ascribed herein:

(1) CONSTRUCTION PURPOSES. The normal and ordinary meaning of the words, except that mining activities or the transportation of materials used in or produced by mining or forestry activities shall not be construed to be included;

(2) HEAVY DUTY EQUIPMENT. Any motor vehicle used primarily off the open road for construction purposes, including all road construction equipment whose gross weight exceeds 16,000 pounds, but not including inventory on hand for sale by duly licensed equipment dealers.

(b) The subjects of ad valorem taxation, except as exempted by law, shall be as follows:

(1) Every piece, parcel, tract, or lot of land in this state, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as minerals, the right to mine minerals, the right to turpentine, oil or petroleum, natural gas, and the right to remove same from the soil, or any other interests when such interests are owned by persons other than the owner of the surface or soil, except growing crops, standing timber, or any tree, bush, vine, or other growing thing from which a crop is harvested;

(2) All docks, wharves, wharf boats, landings, warehouses, toll bridges, ferries, canals, passes, channels, turnpikes, all street railroads, printing presses, and materials;

(3) All steamboats, barges, vessels, and watercraft of every name and kind however propelled, plying waters of this state, and the owner thereof shall return same for taxation to the assessors in the county wherein he resides; and, if such steamboat, barge, vessel, or watercraft is owned by a corporation, then in that county where its principal office is located; in the case of the owner's being an individual not residing in this state or being a corporation with no principal office in this state, then in the county or counties where used; all such steamboats, barges, vessels, or watercraft whether owned by a resident or nonresident of this state, which have acquired a permanent situs in this state. All transfer boats, steamboats, or barges used by any railroad in transferring cars and passengers must be assessed and taxed in the county or counties where used, or where the owner resides, regardless of where such vessel may be registered;

(4) All stocks of goods, wares, and merchandise, the assessment to be on the average amount on hand during the preceding year, except in cases where business is commenced on or after October 1 of a current year, and in such cases the assessment to be on the capital actually employed in the business and apportioned as hereinafter provided, but the amount so assessed for any whole year shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares, and merchandise kept on plantations or elsewhere, or by railroad companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares, and merchandise offered for sale by any person commencing business subsequent to October 1 of a current year, but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after January 1, the tax shall be three fourths of the tax for the whole

year; if commenced after April 1, the tax shall be one half of the tax for the whole year; provided, that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation, receiver, or trustee carrying on such business shall fail to make return of the amount of stock of goods, wares, and merchandise as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, wares, or merchandise, and may also by inquiry of persons believed to have knowledge of the subject obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment;

(5) All household and kitchen furniture, mechanical and electrical refrigerators, libraries, jewelry, precious stones, plate and silverware, ornaments and articles of taste, pianos and other musical instruments, paintings, clocks, gold, silver and other watches and gold and other safety chains, all wagons and other vehicles; all motor cars, automobiles, trucks, buses, tractors, motorcycles, and other motor vehicles and bicycles; travel trailers, utility trailers, semitrailers, and all other trailers of any kind; all outboard motors; airplanes, airships, and other aircraft and aircraft landing fields and equipment; all typewriters; all cash registers; all calculating machines; all bookkeeping machines, teletypes, dictaphones, and other recording or sending apparatus or machines; all phonographs and all machines of like character; all radio sending and receiving sets and appliances; all iron safes and cabinets, all store fixtures, all office furniture and fixtures; all mechanical tools and farming implements; all tanks, all storage reservoirs or basins; all golf bags, golf sticks, and all

other sporting goods; all pistols and guns; all cattle and horses, mules, studs, jacks and jennets; all hogs, sheep and goats, except as specifically exempted; all x-ray machines; all lens grinding machines, all eye-testing machines, all surgical instruments and all other instruments or appliances used in surgical, dental, medical, optometrical, or other professional work;

(6) All money hoarded, whether in the custody of the owner in this state, or in another state, or in any safety deposit box, safe, or vault, or elsewhere, except money on deposit in banks which is specifically exempted from taxation;

(7) All investments in bonds, except bonds of the United States, the State of Alabama, and of counties and municipalities of this state, warrants or other obligations of county and city school boards in this state, and such other bonds as are not by law taxable; and all capital invested in bonds or currency which are exempt from taxation shall be liable to be taxed under this section should such capital at any time during the year be reconverted into money, bonds, or property which is taxable, unless it is made to appear that the money, bonds, or property into which such reconversion may be made has been assessed for taxes for such year;

(8) All roadbed, track, engines, cars, derricks, cranes, signals, crossties, and other property, real and personal, of railroads, of mining and manufacturing plants, and all tramroads, pole-roads, canals, ditches, and channels used for transporting or moving mineral ore, lumber, timber, logs, minerals, coal, ore, sand, gravel, or other commodities, whether raw or manufactured, which are not taxed as improvements on the land or plant or main property, of the owner of such tramroads, pole-roads, canals, ditches, or channels;

(9) Shares in corporations or associations, not incorporated under the laws of this state, except stock in national banks; in arriving at the value of shares of stock of a corporation or association for the purposes of taxation, whether said corporation is domestic or foreign, all dividends earned or declared and not distributed shall be treated as assets of said corporations;

(10) On the gross amount of sales of goods, wares, and merchandise owned by nonresidents made at auction in or during the tax year preceding the assessment of goods, wares, and merchandise kept in stores for sale in the ordinary course of business, each auctioneer shall be assessed and shall pay a tax of one fourth of one percent, and each auctioneer shall pay a like tax on the gross amount of sales made by him of goods, wares, and merchandise owned by citizens of this state which have been imported into this state and sold at auction before same have been assessed for taxes as other property; but on sales of goods, wares, and merchandise and fruit by cargo at auction, the rate of taxation shall be one eighth of one percent;

(11) On the gross amount of commissions or sums charged and received during each year by any auctioneer; provided, that nothing herein contained shall be construed as levying a tax on commissions received for the sale or rental of real estate, or brokerage on loans or real estate or the underwriting of insurance;

(12) All the real and personal property of water companies, including pumping stations, reservoirs, standpipes, towers, pipelines, gates, valves, tunnels, canals, and dams used in the business of supplying water to consumers for pay; all real and personal property of hydroelectric power, steam, or other power and light companies; natural and manufactured gas companies and gas light companies, including all machinery, engines, dynamos, wires, poles, pipelines, tubes, and appliances of every nature and description used in connection therewith; all real and

personal property of every furnace, rolling mill, mine, quarry, or manufacturing establishment, including all machinery, all engines, hoisting engines, derricks, and appliances of every nature used in the business; all dams across rivers and creeks; all real and personal property of cotton gins, cotton mills, cotton compresses, cottonseed oil mills, grain elevators, flour and grist mills, molasses and syrup mills, paper mills, chemical plants or manufactories, fertilizer factories or mixing plants; all peanut oil mills and peanut mills, creosoting plants, concrete mixing plants, cross-tie plants, and stave mills and heading mills;

(13) All property, real and personal, of all cement plants, lime plants, plaster plants, or quarries or other manufacturing, mining, or quarrying plants not herein specifically exempted;

(14) All property, including heavy duty equipment, used for construction purposes.

(15) All manufactured homes located on land owned by the manufactured home owners, except those manufactured homes rented or leased for business purposes, other than those manufactured homes in the inventory of a manufactured home dealer or manufacturer.

(16) All other property, real, personal, or mixed, not hereinbefore specified, of whatever class, whether ejusdem generis or not, except as herein specifically exempted, which said property shall be assessed and specifically described.

(c)(1) All property described in subdivision (b)(14) brought into the state after October 1 of any tax year and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the state on October 1. In addition, heavy duty equipment brought into the state after October 1 and after the assessor has com-

pleted his assessment shall be subject to taxation the same as if it had been held or owned in the state on October 1; except that such tax shall be prorated with respect to the number of months remaining in the year.

(2) Property described in subdivision (b)(15) shall be taxed as realty. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 21; Acts 1967, No. 240, p. 619; Acts 1973, No. 1007, p. 1542, § 1; Acts 1977, No. 698, p. 1233; Acts 1988, 1st Ex. Sess., No. 88-824, p. 265, § 4; Acts 1991, No. 91-694, p. 1340, § 4.)

Ala. Code § 40-14-40 (1993) provides:

§ 40-14-40. Amount of levy on domestic corporations.

Every corporation organized under the laws of this state, except strictly benevolent, educational, or religious corporations, shall pay annually to the state an annual franchise tax based on its capital stock as follows:

For the tax year beginning	Rate on each $1,000.00 of capital stock
January 1, 1984	$10.00
And all tax years thereafter	$10.00

provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $50. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 347; Acts 1955, 2nd Ex. Sess., No. 74, p. 191, § 1; Acts 1971, 1st Ex. Sess., No. 103, p. 184, § 1; Acts 1983, No. 83-745, p. 1233, § 1.)

Ala. Code § 40-14-41 (1993) provides:

§ 40-14-41. Levy on foreign corporations.

(a) *Amount of levy.*—Every corporation organized under the laws of any other state, nation or territory and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of $3 on each $1,000 of the actual amount of its capital employed in this state. Corporations which have qualified to do business in this state shall for the purpose of this title prima facie be held to be doing business in Alabama; provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $25.

(b) *Definition of capital.*—The total capital of such foreign corporation shall be deemed to be an amount equal to the sum of the following:

(1) The outstanding capital stock;

(2) Surplus and undivided profits, which shall include any amounts designated for the payment of dividends until such amounts are definitely and irrevocably placed to the credit of stockholders subject to withdrawal on demand;

(3) The amount of bonds, notes, debentures, or other evidences of indebtedness maturing and payable more than one year after the first day of the franchise tax year;

(4) The amount of the bonds, notes, debentures, or other evidences of indebtedness maturing and payable at the time to (i) any individual stockholder owning directly or indirectly 10 percent or more of the capital stock of such foreign corporation, or (ii) another corporation owning more than 50 percent of the capital stock of such corporation, or (iii) another corporation more than 50 percent of the capital stock of which is owned by such foreign corporation, and

which other corporation referred to in (ii) or (iii) is not also required to pay a franchise tax to the State of Alabama;

(5) The amount reasonably required to adjust the depreciable property accounts for any rapid, excessive or unreasonable depreciation charges or amortization, so as to restore the depreciable property accounts, for franchise tax purposes, to original cost less depreciation computed on the basis of the useful life of such property to the corporation.

(c) *Determination of capital employed in state.*—The actual amount of such total capital as herein defined which is employed in this state shall be determined in accordance with generally accepted accounting principles appropriate in the particular case, and such determination shall establish a rebuttable presumption as to the actual amount of capital employed by the corporation in this state; provided, that in the case of organizations whose accounts and records are kept according to rules prescribed by a regulatory agency or instrumentality of the United States or by the Alabama Public Service Commission, or by a state insurance department, the actual amount of capital employed in this state as so determined shall in no event exceed the value of the sum of its tangible property located in this state and its intangible property employed in the conduct of its business in this state.

(d) *Exclusions and deductions.*

(1) There shall be excluded from the amount of capital as determined in subsection (b) of this section the investment by the taxpayer in the capital of other corporations organized under the laws of Alabama, or under the laws of any other state if such other corporations also pay a franchise tax to the State of Alabama, unless the taxpayer is a dealer in stocks or securities, and

(2) There shall be deducted from the amount of capital employed in this state as determined in accordance with subsections (b) and (c) of this section, the following amounts:

a. The aggregate amount of loans of money made by the taxpayer in this state and which shall be secured by existing mortgage or mortgages to it on real estate in this state and upon which mortgage or mortgages there shall have been paid the recording privilege tax provided by law;

b. The amount invested by the taxpayer in bonds or other securities issued by the State of Alabama, or any county, municipality, or other political subdivision of the State of Alabama, or any public corporation organized under the laws of the State of Alabama, unless such corporation is a dealer in securities;

c. The amount invested by the taxpayer in all devices, facilities, or structures, and all identifiable components thereof or materials for use therein, acquired or constructed primarily for the control, reduction, or elimination of air or water pollution; and

d. The amount invested by the taxpayer in all real and tangible personal property, equipment, facilities, structures, and components thereof, and materials used in the manufacturing. assembling, or constructing of products or equipment of any kind that are acquired or constructed by the taxpayer and placed in service in a qualifying county of the state (as hereinafter defined) within a period commencing with the date of issuance of a qualification certificate as provided for herein and ending five years thereafter (such real and personal property, equipment, facilities, structures and components thereof, and materials being herein called "qual-

ifying property"). Before any such amount invested by a taxpayer may be deducted from the amount of its capital employed in this state as determined in accordance with subsections (b) and (c) of this section, a qualification certificate must be issued to the taxpayer prior to the due date of the report required by Section 40-14-44 for the year in which investment in qualifying property is first made, a copy of which such qualification certificate shall be filed with the taxpayer's report made pursuant to Section 40-14-44 for such year and for each year thereafter. Such qualification certificate shall state that a committee composed of the Governor of the state, the State Finance Director, and the Revenue Commissioner of the state has, prior to or on the date of such qualification certificate, met and determined, as of such date, 1. that the county in which qualifying property owned or to be owned by the taxpayer is or is to be located was a qualifying county as herein defined, 2. that the Alabama Development Office (or such similar organization of the state which shall succeed to its duties) has certified to the Governor that the economic benefits of investment by the taxpayer in qualifying property located or to be located in the qualifying county will be of a type advantageous to the well-being of the citizens of the state and of significant benefit to the qualifying county in terms of reducing the rate of unemployment therein, and 3. that the taxpayer has entered into an agreement or agreements with the state of the type hereinbelow described. A "qualifying county" for purposes of this subparagraph d. shall be any county of the state (i) which, as of the calendar month next preceding the date of any qualifcation cer-

tificate issued hereunder, has an unemployment rate higher than that of the United States for the same month, in both cases as published in the official statistics compiled and reported by the Bureau of Labor Statistics of the United States Department of Labor, and (ii) the governing body of which shall have, prior to the date of any qualification certificate issued hereunder, presented to the Governor a certified copy of a resolution adopted by the governing body of the county approving of and urging the issuance of qualification certificates of the committee herein provided for with respect to investments in qualifying property made by taxpayers in the county. The issuance by the committee of any qualification certificate hereunder shall be conditioned upon the taxpayer having prior thereto or contemporaneously therewith entered into such agreement or agreements with the state as the committee herein provided for shall have determined to be appropriate, which such agreements may be signed in the name of said committee for and on behalf of the state by the Governor, pursuant to which the taxpayer shall have agreed to invest, within such period as said committee shall specify, such amounts in qualifying property located in a qualifying county as said committee shall specify. The right of any taxpayer to deduct, pursuant to the lawful issuance of a qualification certificate as provided for herein, amounts invested in qualifying property shall not be subject to revocation and shall continue to be effective so long as and to the extent the taxpayer shall have amounts invested in qualifying property, unless the taxpayer shall fail to comply with the terms of the agreement or agreements with the state hereinabove provided for,

in which case the right of the taxpayer to deduct amounts reflecting investments in qualifying property shall cease and determine. The committee provided for herein shall be empowered to issue qualification certificates as provided for herein only during the period commencing with April 30, 1985, and ending on the date five years thereafter.

e. The amount invested by the taxpayer in all real and tangible personal property, equipment, facilities, structures, and components thereof including all aircraft replacement parts, components, systems, supplies, and sundries affixed or used on said aircraft, and ground support equipment and vehicles used by or for the aircraft, when used by a certificated or licensed air carrier with a hub operation within this state, for use in conducting intrastate, interstate, or foreign commerce for transporting people or property by air. For the purpose of this paragraph, the words "but operation within this state" shall be contrued to have all of the following criteria:

1. There originate from the location 15 or more flight departures and five or more different first-stop destinations five days per week for six or more months during the calendar year; and

2. Passengers and/or property are regularly exchanged at the location between flights of the same or a different certificated or licensed air carrier. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 348; Acts 1955, 2nd Ex. Sess., No. 74, p. 191, § 2; Acts 1961, No. 912, p. 1462, § 1; Acts 1963, No. 255, p. 666, § 1; Acts

1965, No. 764, p. 1375; Acts 1969, No. 1138, p. 2126; Acts 1971, 1st Ex. Sess., No. 103, p. 184, § 2; Acts 1971, No. 499, p. 1210; Acts 1973, No. 469, p. 678; Acts 1973, No. 1173, p. 1981; Acts 1985, No. 85-412, p. 374; Acts 1986, No. 86-214, p. 282, § 5.)

Ala. Code § 40-14-70 (1985 Supp.) provided:

§ 40-14-70. Assessment and collection.

(a) Every share of any domestic corporation except:

(1) Financial institutions which comply with the provisions of this title as to the excise taxes herein levied on such financial institutions (financial institutions within the meaning of this section and as expressly exempted from the provisions hereof are hereby defined as follows: Any corporation or any legal entity whatever doing business in this state as a bank, banking association, trust company, industrial or other loan company, building and loan association and any other corporation or institution employing money capital coming into competition with the business of national banks); and

(2) Insurance companies which are subject to the provisions of this title as to premium taxes herein levied on such insurance companies and which shall be exempt from the tax assessed hereunder,

shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or principal office in the state and shall be assessed at 20 percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation.

(b) In the event the excise tax levied by this title upon such financial institutions be declared unconstitutional, the tender to the department of revenue of such excise tax despite such unconstitutionality shall be a bar to any demand, claim, levy or assessment of any ad valorem tax under this section.

(c) The president or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the department of revenue a list showing the total number of shares of the capital stock of such

corporation and the par value thereof, the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for same, and the annual dividend declared on the stock of such corporation for the last three years, and the value of the shares as shown by the books of the corporation, and by the last report of the officers to the shareholders, and the amount of surplus, and the amount of the undivided profits not included in the surplus, and such other information as may be required by the department of revenue. There shall be attached to the copy of the return made to the department of revenue a true balance sheet as shown by the books, showing the condition of such corporation at the close of its fiscal period next preceding October 1 of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager to the department of revenue and to the county tax assessor on forms prescribed and furnished by the department of revenue of all taxable property, real and tangible personal, situated in the state and owned by such corporation.

(d) The department of revenue, after determining the total value of the shares of capital stock, shall deduct from the total value of such shares:

(1) The book value of real and tangible personal property owned in other states, and the book value of all devices, facilities or structures, and all identifiable components thereof, or materials for use therein, designed or constructed primarily for the control, reduction or elimination of air or water pollution in this state, and used by the domestic corporation primarily for the control, reduction or elimination of air or water pollution where such air or water pollution has been caused by the domestic corporation claiming the deduction.

(2) The book value of goods, wares and merchandise held for sale.

(3) The book value of all real and tangible personal property, equipment, facilities, structures and components thereof and materials used in the manufacturing, assembling or constructing of products or equipment of any kind that are acquired or constructed by the corporation and placed in service in a qualifying county of the state (as hereinafter defined) within a period commencing with the date of issuance of a qualification certificate as provided for herein and ending five years thereafter (such real and personal property, equipment, facilities, structures and components thereof and materials being called "qualifying property"). Before the book value of any such qualifying property may be deducted from the total value of the shares of capital stock of the corporation as determined in accordance with the provisions of this section, a qualification certificate must be issued to the corporation prior to the due date of the return required to be made to the department of revenue by paragraph (c) of this section for the year in which qualifying property is first reflected on the balance sheet of the corporation required to be filed with such return; a copy of such qualification certificate shall be filed with the corporation's return made to the department of revenue pursuant to paragraph (c) of this section for such year and for each year thereafter. Such qualification certificate shall state that a committee composed of the governor of the state, the state finance director and the revenue commissioner of the state has, prior to or on the date of such qualification certificate, met and determined, as of such date, a. that the county in which qualifying property owned or to be owned by the taxpayer is or is to be located was a qualifying county as herein defined, b. that the Alabama development office (or such similar organization of

the state which shall succeed to its duties) has certified to the governor that the economic benefits of investment by the taxpayer in qualifying property located or to be located in the qualifying county will be of a type advantageous to the well-being of the citizens of the state and of significant benefit to the qualifying county in terms of reducing the rate of unemployment therein, and c. that the corporation has entered into an agreement or agreements with the state of the type hereinbelow described. A "qualifying county" for purposes of this section shall be any county of the state (i) which, as of the calendar month, next preceding the date of any qualification certificate issued hereunder, has an unemployment rate higher than that of the United States for the same month, in both cases as published in the official statistics compiled and reported by the bureau of labor statistics of the United States department of labor, and (ii) the governing body of which shall have, prior to the date of any qualification certificate issued hereunder, presented to the governor a certified copy of a resolution adopted by the governing body of the county approving of and urging the issuance of qualification certificates of the committee herein provided for with respect to investments in qualifying property made by taxpayers in the county. The issuance by the committee of any qualification certificate hereunder shall be conditioned upon the corporation having prior thereto or contemporaneously therewith entered into such agreement or agreements with the state as the committee herein provided for shall have determined to be appropriate, which such agreements may be signed in the name of said committee for and on behalf of the state by the governor, pursuant to which the corporation shall have agreed to invest, within such period as said committee shall specify, such amounts in qualifying property located in a qualifying county as said committee

shall specify. The right of any corporation to receive the benefit of the deduction, pursuant to the lawful issuance of a qualification certificate as provided for herein, of the book value of qualifying property as provided for herein shall not be subject to revocation and shall continue to be effective so long as and to the extent the balance sheet of the corporation shall reflect the value of investments made by the corporation in qualifying property, unless the corporation shall fail to comply with the terms of the agreement or agreements with the state hereinabove provided for, in which case the corporation shall not be entitled to receive the benefit of the deduction provided for in this paragraph (d). The committee provided for herein shall be empowered to issue qualification certificates as provided for herein only during the period commencing with April 30, 1985, and ending on the date five years thereafter.

(e) The department of revenue, after determining the total value of the shares of stock remaining for assessment, shall take 20 percent thereof, which shall be the assessed value of the shares of said corporation.

(f) After the assessed value of all the shares has been passed on and determined, the department of revenue shall deduct from the assessed value of such shares the assessed value of the taxable real and tangible personal property owned, assessed and on which taxes are to be paid by the corporation, as shown by such tax return filed by the corporation in the state of Alabama, or as finally determined; provided, that should the assessed value of the real and tangible personal property as shown by such tax return differ from the assessed value of the real and tangible personal property as finally determined by the taxing authorities required to assess such property, or in case of appeal, as finally determined by the court of last resort, the same shall not affect the assessed value of all

the shares of the corporation as fixed by the department of revenue.

(g) After deducting the assessed value of the real and tangible personal property located in the state of Alabama, any remainder shall constitute the residue of said shares of stock of said corporation. The residue divided by the whole number of shares will constitute the assessment for each share of stock.

(h) Whenever the department of revenue shall have passed on the valuation and assessment of the shares of any domestic corporation as herein provided, it shall give notice in writing by certified mail, return receipt demanded, to the president or managing officer or person signing the tax return for the corporation or, if no return has been made, then such notice to be addressed to any officer of the corporation against whose shares the assessment has been made, giving notice of the valuation and assessment, stating that on a day specified, it will determine any complaint against said valuation, which notice must be served at least 10 days before the day specified for a final determination of the assessment. Upon hearing the complaint of protest against any valuation or assessment of the shares of the domestic corporation or if there has been no complaint or objection filed on or before the date specified in the notice for determination of such matter, the department of revenue shall proceed to determine and fix the value of such shares and complete the assessment thereof.

(i) It is the meaning and intent of this section that the assessed value of all the shares of the corporation be fixed by the department of revenue and that there be deducted therefrom the correct assessed value of the real and tangible personal property of the corporation when the same shall finally be determined; provided, that if any property owned by a corporation which property is subject to taxation in this state is omitted from the tax return filed by said corporation, the same shall be assessed as an escape

item or items of taxation in the same manner as escaped property of individuals and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. If the aggregate assessed value of the shares does not exceed the aggregate assessed value of the real and tangible personal property of the corporation, then no tax shall be demanded or collected on the shares. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 25; Acts 1965, No. 391, p. 566; Acts 1965, 2nd Ex. Sess., No. 27, p. 42; Acts 1969, No. 1140, p. 2131; Acts 1973, No. 1172, p. 1978; Acts 1979, No. 79-666, p. 1170; Acts 1981, 1st Ex. Sess., No. 81-975, p. 154; Acts 1985, No. 85-413.)

Ala. Code § 40-14-73 (1993) provides:

§ 40-14-73. Corporations paying tax need not file list of shareholders.

If a corporation by endorsement on its tax assessment or otherwise in writing shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 28.)

Ala. Admin. Code r. 810-2-3-.11 (1991) (repealed 1992) provided:

810-2-3-.11 Determination of Franchise Tax Allocation Factors by Taxpayers Engaged in Multi-State Operations

(1) Purpose—To establish a regulation to define the items and procedures for use by taxpayers in determining the Allocation Factors for foreign franchise tax.

(a) Taxpayers employing capital both with-in and with-out Alabama must complete Schedules C and D of the annual foreign franchise tax return.

(b) A taxpayer's primary use of capital employed in Alabama shall determine the appropriate Allocation Factors to be used in Schedule C of the foreign franchise tax return.

(c) Schedule C.—Allocation Data

1. Cost of manufacturing, processing or fabricating (for those engaged in manufacturing)

2. Sales by destination (for those engaged in selling activities)

3. Gross income (where there is relatively little or no manufacturing or selling)

4. Total dollar amount of active contracts (for those engaged in construction)

5. Total mileage (for those engaged in transportation)

6. Total salaries, wages, and/or salesmen, brokers, or agents commissions

7. Tangible property (original cost) and inventories

(d) Schedule D.—Allocation Factors

1. A taxpayer employing capital in Alabama primarily in Manufacturing, Processing, or Fabricating shall use an arithmetical average of the Alabama percent obtained as determined by Allocation Factors 1, 6, and 7, Schedule C.

2. A taxpayer employing capital in Alabama primarily in Selling shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 2, 6, and 7, schedule C.

3. A taxpayer employing capital in Alabama primarily in Contracting shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 4, 6, and 7, Schedule C.

4. A taxpayer employing capital in Alabama primarily in Transportation shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 3, 5, and 6, Schedule C.

5. A taxpayer employing capital in Alabama primarily in Services shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 3, 6, and 7, Schedule C.

6. A taxpayer employing capital in Alabama primarily in Rentals and/or Leasing shall use an arithmetical average of the Alabama percent as determined by allocation Factors 3 and 7, Schedule C.

Author: Louis R. Mills, Franchise Tax Division.

Authority: § 40-14-58, Code of Alabama 1975

History: Filed with LRS November 8, 1991, refiled March 6, 1992. Repealed March 20, 1992

Alabama Rule of Appellate Procedure 53 and accompanying commentary provide:

RULE 53. OPINIONS AND "NO OPINION" CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

(b) Designation of Category. When the Supreme Court or the Court of Civil Appeals affirms a judgment without an opinion, it shall in its order of affirmance designate the case as a "No Opinion" case and in its order of affirmance it shall also cite section (a)(1) of this rule and that subpart of section (a)(2) relied upon by the court in its decision to write no opinion.

(c) Publication of Decisions. The reporter of decisions shall publish all opinions of the Supreme Court and the Court of Civil Appeals in the official reports of Alabama decisions, but the text of an order of affirmance in a "No Opinion" case shall not be published in the official reports. The "No Opinion" cases of each court shall be collected in a periodic "Table of Decisions Without Published Opinions," which shall be published in the official reports and which shall indicate the action taken in all "No Opinion" cases. However, if in a "No Opinion" case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to which the special opinion is addressed.

(d) Unpublished Decisions Not Precedent. Orders or judgments of the Supreme Court and the Court of Civil Appeals not published in the official reports have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrines of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar.

(e) Time of Publication. An opinion of the Supreme Court shall not be published while an application for rehearing is pending, and an opinion of the Court of Civil Appeals shall not be published while an application for rehearing is pending or while a petition for certiorari review is pending in the Supreme Court. However, the delay

in publication caused by this provision shall not affect the precedential value of an opinion.

[Adopted effective January 1, 1993.]

Court Comment to Rule 53,
Adopted Effective January 1, 1993

This rule is intended to reduce the number of opinions being written by the Supreme Court and the Court of Civil Appeals. It is not intended to affect the current practice of the Court of Criminal Appeals of affirming judgments by unpublished "memorandums" or "memorandum opinions." Therefore, this rule has no application to the Court of Criminal Appeals. See Rule 54.

It is the intent of this rule to eliminate opinions except in those cases wherein an opinion would serve some real purpose. In a case in which none of the specific circumstances set out in section (a)(2)(A) through (E) applies, the court may nevertheless affirm under the more general language of (a)(2)(F). The language of (a)(2)(A) through (F) is intended to allow the courts to omit opinions in most cases wherein the affirmance does not call for the court to establish a new principle of law; to construe a provision of a constitution, statute, ordinance, or court rule; to alter or modify an existing principle of law or to extend it to a new factual context; to reaffirm a principle not applied in a recently reported opinion; to decide an issue of general or continuing public interest; or to resolve a conflict or apparent conflict of authority.

FILED
JUL 14 1998
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SUPREME COURT, U.S.

No. 97-2045

In The
Supreme Court of the United States

OCTOBER TERM, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, et al.

Petitioners,

vs.

**STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE**

Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of Alabama**

BRIEF IN OPPOSITION

BILL PRYOR
Attorney General, State of Alabama
*RON BOWDEN, Counsel
Department of Revenue and Assistant
Attorney General, State of Alabama
DAN E. SCHMAELING, Assistant Counsel
Department of Revenue and Assistant
Attorney General, State of Alabama
P. O. Box 320001
Montgomery, AL 36132-0001
(334) 242-9690

*Counsel of Record for Respondents

QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court's application of state law *res judicata* principles to bar the Petitioners' federal constitutional challenge to a state tax is, under the circumstances, so extreme as to amount to a violation of Petitioners' rights to due process of law.

2. Whether Alabama's franchise tax impermissibly discriminates against interstate commerce by taxing Alabama corporations on the par or stated value of their stock while taxing the Petitioners (out-of-state corporations) on the value of their capital employed in Alabama.

3. Whether this Court should refrain from ruling on the appropriate remedy to apply to this case, which involves a constitutional challenge to a state tax statute and a request for a refund of taxes, when the court below did not have an opportunity to rule on the issue because it found no constitutional violation.

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STATEMENT OF THE CASE

1. The Proceedings Below

The Taxpayers, foreign corporations doing business in Alabama, challenge the franchise tax levied against foreign corporations by §40-14-41, *Code of Ala. 1975*, for the years 1982 through 1991. They filed separate actions in the Circuit Court of Montgomery County as appeals of assessments, mandamus actions to compel the Department to grant petitions for refund of taxes and/or declaratory judgment actions. The actions were consolidated for trial. At the request of the parties, the actions were stayed pending the final outcome of *Reynolds Metals Company v. White*, 558 So.2d 373 (Ala. 1989), cert. denied 496 U.S. 912 (1990). (R. 26)

The Complaints filed prior to 1991 allege that the foreign corporation franchise tax violates the Commerce Clause, the Due Process Clause and the Equal Protection Clause of the United States Constitution, and the corresponding sections of the *Alabama Constitution of 1901*. They later included counts alleging violations of 42 U.S.C. §§1983 and 1988 (since abandoned), and §§44, 212 and 232, *Constitution of Alabama 1901*.

The Alabama Department of Revenue denied all claims and asserted that the Alabama foreign corporation franchise tax violates no constitutional provision and is valid in all respects. The Department also countered that even if the foreign corporation franchise tax is held to be unconstitutional, such

finding should be given prospective application only. The Department also pleaded that these actions are barred by the doctrine of *res judicata*, citing *Reynolds*, which upheld the constitutionality of Alabama's franchise tax regime against a similar attack.

The trial court held that the Taxpayers' claims are barred by *res judicata*. Because of the public importance of the issues presented, however, the trial court addressed the merits of the action, and stated its ruling on each of the issues raised by the parties. The court stated that it would rule in favor of the Department on all issues except the one alleging a violation of the Commerce Clause.

The Taxpayers appealed, the Supreme Court of Alabama affirmed without opinion, and this petition ensued.

2. The Statutory Scheme

The Taxpayers are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to *Code of Ala. 1975*, §40-14-41(a). For purposes of the Alabama franchise tax, a foreign corporation is any corporation organized under the laws of any state other than Alabama. §40-14-41(a). A domestic corporation for purposes of the Alabama franchise tax is any corporation organized under the laws of Alabama. §40-14-40. (Stip. p.1-2)[1]

[1]The stipulated facts were admitted into evidence as Plaintiffs' exhibit 3. See Pet. App. 48a.

(Stip. p. 3)

Section 232, *Constitution of Alabama 1901*, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this State." Section 232 does not define "capital employed in this State." (Stip. p. 3)

Each foreign corporation doing business in Alabama pays franchise tax to the State in an amount which is determined by applying the tax rate of $3.00 per $1,000.00 of capital employed in the State of Alabama by that corporation. Pursuant to Ala. Code §40-14-41(b), "capital" comprises outstanding capital stock, surplus and undivided profits, long term debt, certain related party debts, and accelerated depreciation, less the exclusions and deductions from the tax base set forth in §40-14-41(d). The portion of the total capital that is employed in Alabama is allocated to the state pursuant to §40-14-41(c).

Section 229, *Constitution of Alabama 1901*, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock." The franchise tax on domestic corporations is imposed for the privilege of corporate existence. Capital stock upon which the domestic franchise tax is based is not defined in either §229, *Alabama Constitution of 1901*, or *Code of Ala. 1975*, §40-14-40. (Stip. p. 3, 5)

The Alabama franchise tax imposed upon domestic corporations pursuant to §40-14-40 is computed by applying the tax rate of $10.00 per $1,000.00 to the amount of the par value of the capital

stock of corporations with par value capital stock, and to the amount of the stated value of the capital stock of corporations with no par capital stock.

In addition to the franchise tax, domestic corporations in Alabama pay a corporate shares tax, which is levied on the value of the shares of their stock. Ala. Code §40-14-70.

3. The Evidence

At the request of the Taxpayers, Dr. Larry Richards, Chairman of the Department of Decision Sciences, University of Oregon, prepared a study for the years 1988 through 1991 which purports to show that foreign corporations pay more franchise taxes than they would be required to pay were they domestic corporations. (R. 212-259) The overall results and conclusions of the study performed by Dr. Richards for the years 1988 through 1991 are substantially applicable to the years 1982 through 1987. (Stip. p. 17)

The Department prepared a study comparing the franchise tax actually paid by the named Plaintiffs as foreign corporations with the amount that they would have been required to pay had they been domestic corporations. That study shows that most of the Plaintiff corporations would have paid far more taxes as domestic corporations than they actually paid as foreign corporations. (R. 88-96) See Appendix.

REASONS FOR DENYING THE WRIT

The Petition misrepresents the legal standards applied by the Supreme Court of Alabama in an attempt to create a question that merits this Court's attention. The Supreme Court of Alabama did not refuse to apply this Court's due process standards for the application of *res judicata* contained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), when it barred the Petitioners from litigating this case under state law *res judicata* principles.

Similarly, the Alabama Supreme Court did not refuse to apply this Court's commerce clause jurisprudence when it declined to strike down Alabama's system of franchise taxation. On the contrary, it correctly applied those standards to the Petitioners.

I. The Alabama Supreme Court correctly applied its valid principles of *res judicata* to bar this litigation.

In Alabama the elements of *res judicata*, or claim preclusion, are:

> A prior judgment on the merits; rendered by a court of competent jurisdiction; with substantial identity of the parties; and with the same cause of action presented in both suits.

Dairyland Ins. Co. v. Jackson, 566 So.2d 723 (Ala. 1990).

The party identity criterion of *res judicata* does not require complete identity, but only that the party against whom *res judicata* is asserted was either a party or in privity with a party to the prior action, or that the nonparty's interests were adequately represented by the parties in the prior suit, and that the relationship between the party and the nonparty is not so attenuated as to violate due process. *Whisman v. Alabama Power Company*, 512 So.2d 78 (Ala. 1987). For *res judicata* purposes, privity exists where the nonparty's interests were represented adequately by the party in the original suit or where a party to the original suit is so closely aligned to a nonparty's interest as to be his virtual representative. *NAACP v. Hunt* 891 F.2d 1555 C.A. 11 (Ala. 1990). Judgments can bind persons not party (or privy) to the litigation in question where the nonparty's interests were represented adequately by the party in the original suit. *Green v. Wedowee Hospital*, 584 So.2d 1309 (Ala. 1991).

Richards v. Jefferson County, 517 U.S. 793, 116 S.Ct. 1761 (1996), recognized an exception to the general rule that only parties to a lawsuit are bound by it "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." As this Court explained in *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989):

> We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has its interests adequately represented by someone with the same interests who is a party.

Thus, it can be seen that this court has adopted essentially the same standard as has the Supreme Court of Alabama with regard to the party identity criterion of *res judicata*. Because of the unique facts of their situation, the standard was applied correctly to the Taxpayers to preclude their challenge to Alabama's franchise tax. The Taxpayers' unique problem in this case is too insubstantial an issue to justify this Court's further review.

Richards essentially held that Birmingham's acting finance director and the city itself, which had challenged the same tax in *Bedingfield v. Jefferson County*, 527 So.2d 1270, did not adequately represent, or were not in privity with, the two privately employed taxpayers who sought to represent a class of all nonfederal employees subject to the county's tax. An obvious reason for the holding in *Richards* is that Birmingham's acting finance director and the city itself are not members of the class that the privately employed taxpayers in *Richards* sought to represent. The facts of the present case are distinguishable from *Richards* and support a different conclusion.

Both of the taxpayers in *Reynolds Metals Company v. White*, 558 So.2d 373 (Ala. 1989), cert. denied 496 U.S. 912 (1990), can be said to be members of the same class as the taxpayers in this case. The Taxpayers' interests were adequately represented by the taxpayers in *Reynolds*.

Reynolds is a major manufacturer with extensive plants located in the State of Alabama. Its franchise tax liability is substantial, so that it had every reason to protect its interest in this area. Furthermore, Reynolds

and its co-plaintiffs, General Motors Corporation, GMAC Leasing Corporation, and General Motors Acceptance Corporation, possess the resources to vigorously pursue their own best legal interests, and they did so. They were represented in the prior litigation by some of the top law firms in the State of Alabama, which rendered to them more than competent representation.

Both the *Reynolds* plaintiffs and the taxpayers in the present cases are foreign corporations doing business in Alabama subject to the Alabama franchise tax. Their interests with respect to the Alabama franchise tax parallel one another in that they both have a substantial financial interest in seeing to it that their franchise tax liability is minimized to the greatest extent possible.

Furthermore, one of the taxpayers in these cases filed a complaint during the pendency of the *Reynolds* case but allowed *Reynolds* to go forward while its suit remained dormant in anticipation that *Reynolds* would decide the issues that they seek to have resolved.[2] These taxpayers filed petitions for refund with the Department during the pendency of the *Reynolds* case, and allowed those petitions to languish pending a decision in *Reynolds*.

The Taxpayers are substantially identical to the *Reynolds* plaintiffs in that they all constitute major foreign corporations doing business in Alabama

[2]See letter to Judge Gordon from Byars dated January 19, 1990, R. 26; Pet. App. 65a.

subject to the franchise tax with identical interests with regards to the validity of the franchise tax. In a sense they have substantial identity or privity with the *Reynolds* plaintiffs. At the very least, they constitute nonparties to *Reynolds* whose interests were adequately represented in that case and under Alabama law are deemed to be substantially identical parties to the *Reynolds* plaintiffs.

II. The Alabama franchise tax on foreign corporations does not violate the Commerce Clause of the United States Constitution.

The Taxpayers argue that the Alabama franchise tax statute facially discriminates against interstate commerce and thereby violates the "virtually per se rule of invalidity" that this Court applies to facially discriminatory taxes, and cites *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S.Ct. 1590 (1997); *Fulton Corporation v. Faulkner*, 516 U.S. 325 1996; and *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994), as authority for this proposition.

The pertinent Alabama statutes do not support the Taxpayers' allegation. Instead, they reveal that the measure of the franchise tax on foreign corporations is $3.00 per $1,000.00 of capital employed by the corporation in the State of Alabama. The measure of the tax levied on domestic corporations is $10.00 per $1,000.00 of capital stock of the corporation. Because the measure of the two taxes admittedly has different rates and bases, it cannot be determined from reading them whether any discrimination exists. If it can be

said that there is any facial discrimination in these statutes, however, it is against domestic corporations--not foreign ones--since the domestic corporations are taxed on all of their capital stock, whereas foreign corporations are taxed on only the capital that they employ within the State of Alabama; and since the rate applied against the domestic base is $10.00 per one thousand, while the rate applied against the foreign base is only $3.00 per one thousand.

The Taxpayers assert that Alabama's franchise tax "in its practical operation works discrimination against interstate commerce," *Best and Co. v. Maxwell*, 311 U.S. 454-456 (1940), and therefore violates the commerce clause prohibition against state taxes that have a "discriminatory effect," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). *Reynolds* held otherwise, and the evidence in this case continues to support its holding.

The evidence shows that had the twelve named Plaintiffs in the present case paid franchise and shares tax to Alabama as domestic corporations rather than as foreign corporations, their taxes in most instances would have been increased many times over. The increases, which are detailed in a study prepared by the Department (attached as Appendix A to this brief), are no less than startling in amount.[3] After noting that a similar situation existed with respect to the taxes that one of the *Reynolds* Plaintiffs would have paid had it been taxed as a domestic corporation, the *Reynolds* Court stated "Thus, Alabama's taxation of domestic

[3]Expanded upon at R. 88-96.

and foreign corporations does not violate the Commerce Clause."

The Taxpayers argue that they submitted evidence in the trial court that was lacking in *Reynolds Metals* that "demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Their evidence consists of a study prepared by Dr. Richards (Taxpayers' Exhibit 1) comparing the amount of taxes actually paid by randomly selected domestic corporations with the amount they would have paid had they been taxed as foreign corporations. The results purport to prove that the tax discriminates against foreign corporations.

The *Reynolds* plaintiffs likewise based their contention that the tax discriminates against foreign corporations on data compiled from randomly selected corporations, which purported to show that foreign corporations on average paid more taxes than did their domestic counterparts. The evidence in neither case overcomes the fact that the taxes for any particular corporate taxpayer may be higher or lower depending on its corporate structure and operations when taxed as either a foreign or a domestic corporation.

The fact that one of the taxpayers in *Reynolds* paid significantly less taxes as a foreign than it would have as a domestic and that most of the Taxpayers in the present case would pay more taxes as domestic corporations than they in fact paid as foreign corporations proves this. The evidence produced in the present case is very similar to the evidence produced in *Reynolds*. It warrants the same result.

The Taxpayers emphasize that domestic corporations can reduce their franchise tax liability by manipulating the amount of their outstanding shares of stock, as if foreign corporations do not also minimize their tax liability by manipulating their tax bases. However, one of the Taxpayers' witnesses, Mr. Richard G. Bacon, testified that although some corporations have the ability to manipulate the tax that they would pay by limiting the number of shares that they issue, very large public corporations do not have the ability, and that there may be business reasons for not manipulating the tax base. (R. p. 125-162.) The Department offers that to the extent that business considerations allow them to do so, foreign corporations can reduce their tax liability by reducing the capital they employ in Alabama, just as domestic corporations can reduce their tax liability by reducing the value of their shares of stock.

Reynolds held that the Alabama franchise tax does not discriminate against foreign corporations as applied. However, even if this court finds that the Taxpayers have proved discrimination, they are not entitled to prevail in their attack on the constitutionality of Alabama's franchise tax.

A tax may discriminate against interstate commerce and still not violate the Commerce Clause. In order for such a discriminatory tax to be upheld the State must "show that it advances a legitimate local purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives, *New Energy Company of Indiana v. Limbach*, 108 S.Ct. 1803, 1810 (1988); or show that the "discrimination is demonstrably justified by a valid factor unrelated to

economic protectionism, *Chemical Waste Management v. Hunt*, 112 S.Ct. 2009, 2015 (1992).

The Alabama Supreme Court applied substantially the above standards in *Reynolds* to uphold the constitutionality of the foreign corporation franchise tax. The Court stated at page 388:

> Even assuming that the lack of uniformity in the taxes on domestic and foreign corporations rose to a level of discrimination that would invoke equal protection or commerce clause analysis, we would hold that §40-14-41 does not violate those provisions, for the following reasons.

The Court went on at pages 388 and 389 to articulate several legitimate purposes for those statutory distinctions between foreign and domestic corporations, which include the mandate of the Alabama Constitution, ease of regulation and enforcement, differences in the utilization of State natural resources between foreign and domestic corporations, differences in the employment of State residents and the utilization of State services between foreign and domestic corporations, and an original purpose not to discriminate. Thus even if the present Taxpayers had proved that Alabama's franchise tax regime discriminates against foreign corporations, such discrimination would not violate the Commerce Clause.

The Taxpayers imply that the standard for determining whether a tax is "compensatory" has been substantially narrowed since *Reynolds Metals* was decided in 1989. They assert that the holding in that

case that Alabama's shares tax is compensatory and complementary to the franchise tax is no longer valid because it does not meet the three conditions necessary for a valid compensatory tax set forth in *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994):

1. Identify the tax burden for which the State is attempting to compensate.

2. The tax on interstate commerce must be shown roughly to approximate--but not to exceed--the amount of the tax on intrastate commerce.

3. The events on which the interstate and intrastate taxes are imposed must be "substantially equivalent".

The above standards do not constitute a significant departure from the standards in effect at the time that the Alabama Supreme Court in *Reynolds* decided that Alabama's shares tax is complementary to the franchise tax. As to the first condition, both in 1989 and now, the Department identified the tax burden for which the State is attempting to compensate as the franchise tax burden on foreign corporations.

As to the second condition, the taxpayers in *Reynolds* argued that a complementary tax is one that is "intended to effect equality," and that the shares tax fails to satisfy the Complementary Tax Doctrine because it does not create "equality of treatment

between local and interstate commerce," citing *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). The Taxpayers in *Reynolds* also argued to this Court that "the common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce," citing *Maryland v. Louisiana*, 451 U.S. 725 (1981).

As to the third condition, the Taxpayers in *Reynolds* argued that for the Complementary Tax Doctrine to apply, the taxes must be imposed on "substantially equivalent events," citing *Armco, Inc. v. Hardesty*, 464 U.S. 638 (1984), and *Maryland v. Louisiana*, *supra*.

A review of the dates of the above-cited cases shows that there has been no substantial change in the Complementary Tax Doctrine since *Reynolds* was decided in 1989. Consequently, this Court has no more compelling reason to review this case than it did to review *Reynolds*, which it declined to do.

The Taxpayers argue that Alabama cannot satisfy the second and third criteria of the complementary tax doctrine. They argue with regard to the second criterion that there is no equivalence between the tax on interstate commerce and the tax on intrastate commerce. However, the State has already shown that there is no discrimination between the tax burdens borne by foreign and domestic corporations under Alabama's franchise tax. The amount of tax either might pay depends largely on its corporate structure and manner of operation.

The Taxpayers argue with regard to the third criterion that the domestic shares tax and the foreign franchise tax are not imposed on substantially equivalent events. However, the shares tax does complement the foreign franchise tax in the same way that the domestic franchise tax does. The shares tax constitutes a second, double tax on domestic corporations based on the same measure, i.e., the value of the shares of stock.

III. This Court should refrain from ruling on the remedy to be applied (should Alabama's tax be struck down) to allow the Alabama Supreme Court an opportunity to decide this issue in the first instance.

The Taxpayers' request that this Court order tax refunds in this case is simply premature. The Alabama Supreme Court has not had an opportunity to deal with this issue because the tax has not been invalidated. It would be inappropriate for this Court to rule on this issue before the highest court of the state has ruled on it.

The State of Alabama does not agree with the Taxpayers' implication that *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), completely destroyed the ability of courts to apply their holdings prospectively where appropriate. Furthermore, it would be appropriate under *Harper* for any court order invalidating Alabama's franchise tax to be applied prospectively.

CONCLUSION

In deciding this case, the Alabama Supreme Court adhered closely to the decisions of this Court. Therefore, there exists no sound reason to issue a writ of certiorari.

Respectfully submitted,

BILL PRYOR
Attorney General, State of Alabama

*RON BOWDEN, Counsel
Department of Revenue and Assistant
Attorney General, State of Alabama

DAN E. SCHMAELING, Assistant Counsel
Department of Revenue and Assistant
Attorney General, State of Alabama

P. O. Box 320001
Montgomery, AL 36132-0001
(334) 242-9690

*Counsel of Record for Respondents

July 14, 1998

APPENDIX

November 10, 1994

MEMORANDUM

To: Ron Bowden, Chief Counsel
Legal Division

From: Peter M. Petrillo, Jr.
Franchise Tax Division

RE: Modality for 'As If Domestic' Analysis

This memorandum is to recap the modality used to compute the "As If Domestic" analysis (see attachment) prepared for counsel in anticipation of the South Central Bell litigation. The goal of the analysis was to determine, for the foreign franchise tax years 1986 through 1992, the probable total Alabama domestic franchise tax and domestic shares tax which would have been paid had the subject legal entities been domestic corporations rather than foreign corporations.

FACTS

The legal entities and data from foreign franchise tax years analyzed were as follows:

1. BellSouth Telecommunications, Inc.
   1991 - 1992

2. BellSouth Corporation
   1986 - 1992
3. South Central Bell Telephone Company
   1986 - 1992
4. BellSouth Services, Inc.
   1986 - 1992
5. BellSouth Financial Services Corporation
   1986 - 1992
6. BellSouth Advertising & Publishing Corporation
   1986 - 1992
7. BellSouth Resources, Inc.
   1989 - 1992
8. BellSouth Products, Inc.
   1991 - 1992
9. Alabama Cellular Services, Inc.
   1986 - 1992
10. Sunlink Corporation
    1986 - 1992
11. TechSouth, Inc.
    1986 - 1992
12. CSX Transportation, Inc.
    1986 - 1992

The following financial data for each year was taken from each legal entity's Foreign Franchise Tax Return as filed.

I. The capital stock (par value) from liability side of Schedule A - Book Balance Sheet or balance sheet attached to the return in lieu of completing Schedule A.

II. The total value of all shares of stock (total equity) from liability side of Schedule A - Book Balance Sheet or balance sheet attached to the return in lieu of completing Schedule A.
III. The book value of real and tangible personal property (total capital assets) from asset side of Schedule A - Book Balance Sheet or balance sheet attached to the return in lieu of completing Schedule A.
IV. The book value of goods, wares and merchandise held for sale (inventories) from asset side of from Schedule A - Book Balance Sheet or balance sheet attached to the return in lieu of completing Schedule A.
V. The cost of capital stock owned in domestic corporations by the legal entity from Schedule E - Franchise Tax and Permit Fee Computation (see exclusion for foreign corporations paying a franchise tax).
VI. The book value of Alabama real and tangible property from Schedule B - Alabama Capital Asset Data.

ASSUMPTIONS

For each legal entity and all franchise tax years, the following assumptions were made:

A. Only the legal entities, BellSouth Telecommunications, Inc.; South Central Bell Telephone Company; and CSX Transportation,

Inc., were assumed to be public utilities not required by Sec. 40-21-29, Code of Alabama 1975, to list their shares of stock for taxation or to pay ad valorem taxes on said shares computed pursuant to Sec. 40-14-70, Code of Alabama 1975.

B. The Alabama shares tax computations are shown by the foreign franchise tax year's data used to compute the tax rather then by the year for which the amount would be paid. Please note that the Alabama shares tax for 1990 is based on an ending balance sheet which occurs prior to October 1, 1989 (e.g., for calendar year accounting periods, the balance sheet for the year ending December 31, 1988 is used).
C. The foreign franchise tax liability was assumed to be the amount as filed.
D. The domestic franchise tax rate was $10 for each $1,000 of capital stock.
E. The minimum domestic franchise tax was $50.
F. The home or principal office of each legal entity was assumed for each year to be in Birmingham, Jefferson County, Alabama, which was the principal place of business in Alabama listed on the foreign franchise tax returns.
G. The total domestic shares millage rate was determined to be 69.5 mills (6.95%).
    1. The state millage rate for Alabama was 6.5 mills (.65%).
    2. The county, assumed to be Jefferson County, millage rate was 35.6 mills (3.56%) reduced by

a special school tax in Birmingham of 1.1 mills (.11%).
    3. The city, assumed to be Birmingham, Alabama, millage rate was 28.5 mills (2.85%).
H. Shares of stock are considered to be Class II personal property and are assessed at 20%.
I. All legal entities paying an Alabama foreign franchise tax were assumed to be Alabama domestic corporations for purposes of the deduction for costs of domestic capital stock owned by the legal entity noted in Fact V, above.
J. The 'book value of real and tangible personal property in other states' was assumed to be the total 'book value of real and tangible personal property' (see Fact III, above) owned less the 'book value of Alabama real and tangible property' (see Fact VI, above).
K. The county assessment was assumed to be 20% of the 'book value of Alabama real and tangible personal property' (see Fact VI, above).
L. Some information is not disclosed on the foreign franchise tax return regarding possible deductions to the total value of all shares of stock, e.g., investment in U.S. government obligations; book value of air pollution equipment; and book value of motor vehicles otherwise assessed. These were assumed to be either zero or already included in other deductions made in the calculation.
M. See each attached financial detail schedules for specific assumptions made for each legal entity.

CALCULATIONS

Domestic Franchise Tax: The domestic franchise tax was calculated by multiplying the legal entity's capital stock by the domestic franchise tax rate ($10 per $1,000 of capital stock), but could not be less than the minimum tax of $50.

Domestic Shares Tax: The domestic shares tax for the legal entity was computed by multiplying the 'residue of total value of stock for assessment' by the 'total domestic shares tax millage rate' (69.5 mills).

1. The 'total value of all shares of stock' (see Fact II, above) was reduced by deductions for the 'book value of real and tangible personal property in other states' (see Assumption J, above), the 'book value of goods, wares and merchandise held for sale' (see Fact IV, above), and the 'cost of capital stock owned in domestic corporations' (see Fact V, above).
2. The 'total value of all shares of stock remaining for assessment', was multiplied by the 20% state assessment rate.
3. This state assessment amount was then reduced by the county assessments to produce the

'residue of total value of stock for assessment'.

Attachment

cc: Ernest J. Broadhead, Chief
Louis R. Mills, Assistant Chief

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	3,097,780
Shares Tax	5,307,201
Total Domestic Corporation Tax	8,404,981
Domestic Tax over (under) Foreign Tax	8,404,956
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	4,952,697
Domestic Corporation (As If)	
Franchise Tax	29,334,107
Shares Tax	0
Total Domestic Corporation Tax	29,334,107
Domestic Tax over (under) Foreign Tax	24,381,410

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	3,224,910
Shares Tax	19,255,869
Total Domestic Corporation Tax	22,480,779
Domestic Tax over (under) Foreign Tax	22,480,754
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	4,995,844
Domestic Corporation (As If)	
Franchise Tax	29,489,203
Shares Tax	0
Total Domestic Corporation Tax	29,489,203
Domestic Tax over (under) Foreign Tax	24,493,359

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	4,858,780
Shares Tax	105,638,936
Total Domestic Corporation Tax	110,497,716
Domestic Tax over (under) Foreign Tax	110,497,691
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	4,927,214
Domestic Corporation (As If)	
Franchise Tax	29,661,305
Shares Tax	0
Total Domestic Corporation Tax	29,661,305
Domestic Tax over (under) Foreign Tax	24,734,091

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	4,859,900
Shares Tax	101,254,602
Total Domestic Corporation Tax	106,114,502
Domestic Tax over (under) Foreign Tax	106,114,477
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	5,219,546
Domestic Corporation (As If)	
Franchise Tax	29,846,305
Shares Tax	0
Total Domestic Corporation Tax	29,846,305
Domestic Tax over (under) Foreign Tax	24,626,759

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	545
Domestic Corporation (As If)	
Franchise Tax	4,862,290
Shares Tax	116,976,429
Total Domestic Corporation Tax	121,838,719
Domestic Tax over (under) Foreign Tax	121,838,174
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	5,334,015
Domestic Corporation (As If)	
Franchise Tax	30,243,520
Shares Tax	0
Total Domestic Corporation Tax	30,243,520
Domestic Tax over (under) Foreign Tax	24,909,505

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	42,946,058
Shares Tax	0
Total Domestic Corporation Tax	42,946,058
Domestic Tax over (under) Foreign Tax	42,946,033
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	4,866,470
Shares Tax	110,064,056
Total Domestic Corporation Tax	114,930,526
Domestic Tax over (under) Foreign Tax	114,930,501
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	5,210,339
Domestic Corporation (As If)	
Franchise Tax	30,243,523
Shares Tax	0
Total Domestic Corporation Tax	30,243,523
Domestic Tax over (under) Foreign Tax	25,033,184

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	6,371,607
Domestic Corporation (As If)	
Franchise Tax	73,189,591
Shares Tax	0
Total Domestic Corporation Tax	73,189,591
Domestic Tax over (under) Foreign Tax	66,817,984
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	5,311
Domestic Corporation (As If)	
Franchise Tax	4,982,870
Shares Tax	24,314,649
Total Domestic Corporation Tax	29,197,519
Domestic Tax over (under) Foreign Tax	29,192,208
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	Total
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	6,371,632
Domestic Corporation (As If)	
Franchise Tax	116,135,649
Shares Tax	0
Total Domestic Corporation Tax	116,135,649
Domestic Tax over (under) Foreign Tax	109,764,017
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	5,981
Domestic Corporation (As If)	
Franchise Tax	30,653,000
Shares Tax	482,811,742
Total Domestic Corporation Tax	513,464,742
Domestic Tax over (under) Foreign Tax	513,458,761
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	30,639,680
Domestic Corporation (As If)	
Franchise Tax	178,818,013
Shares Tax	0
Total Domestic Corporation Tax	178,818,013
Domestic Tax over (under) Foreign Tax	148,178,333

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	30,950
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	340,524
Total Domestic Corporation Tax	340,574
Domestic Tax over (under) Foreign Tax	309,624
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	60,038
Domestic Corporation (As If)	
Franchise Tax	1,825,840
Shares Tax	2,400,780
Total Domestic Corporation Tax	4,226,620
Domestic Tax over (under) Foreign Tax	4,166,582

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	108,774
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-108,724
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	59,922
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	2,386,777
Total Domestic Corporation Tax	2,386,827
Domestic Tax over (under) Foreign Tax	2,326,905

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	139,893
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-139,843
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	55,586
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	2,395,401
Total Domestic Corporation Tax	2,395,451
Domestic Tax over (under) Foreign Tax	2,339,865

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	135,610
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-135,560
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	130,334
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-130,284
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	56,659
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	2,775,518
Total Domestic Corporation Tax	2,775,568
Domestic Tax over (under) Foreign Tax	2,718,909

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	205,525
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-205,475
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	16,908
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	39,657
Total Domestic Corporation Tax	39,707
Domestic Tax over (under) Foreign Tax	22,799
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	71,861
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	3,542,548
Total Domestic Corporation Tax	3,542,598
Domestic Tax over (under) Foreign Tax	3,470,737

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	206,333
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-206,283
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	28,539
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	139,737
Total Domestic Corporation Tax	139,787
Domestic Tax over (under) Foreign Tax	111,248
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	75,421
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	4,143,354
Total Domestic Corporation Tax	4,143,404
Domestic Tax over (under) Foreign Tax	4,067,983

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	17,172
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	155,221
Total Domestic Corporation Tax	155,271
Domestic Tax over (under) Foreign Tax	138,099
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	65,829
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	4,557,719
Total Domestic Corporation Tax	4,557,769
Domestic Tax over (under) Foreign Tax	4,491,940

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	Total
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	827,110
Domestic Corporation (As If)	
Franchise Tax	350
Shares Tax	340,524
Total Domestic Corporation Tax	340,874
Domestic Tax over (under) Foreign Tax	-486,236
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	193,028
Domestic Corporation (As If)	
Franchise Tax	350
Shares Tax	334,615
Total Domestic Corporation Tax	334,965
Domestic Tax over (under) Foreign Tax	141,937
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	445,316
Domestic Corporation (As If)	
Franchise Tax	1,826,140
Shares Tax	22,202,097
Total Domestic Corporation Tax	24,028,237
Domestic Tax over (under) Foreign Tax	23,582,921

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	15,205
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-15,155

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	13,819
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	1,597
Total Domestic Corporation Tax	1,647
Domestic Tax over (under) Foreign Tax	-12,172

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	43,602
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	25,552
Total Domestic Corporation Tax	25,602
Domestic Tax over (under) Foreign Tax	-18,000

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	7
Total Domestic Corporation Tax	57
Domestic Tax over (under) Foreign Tax	32
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	40,402
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	41,095
Total Domestic Corporation Tax	41,145
Domestic Tax over (under) Foreign Tax	743

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,576
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	56,504
Total Domestic Corporation Tax	56,554
Domestic Tax over (under) Foreign Tax	51,978
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Franchise Tax	
Shares Tax	
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	45,069
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	34,888
Total Domestic Corporation Tax	34,938
Domestic Tax over (under) Foreign Tax	-10,131

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	2,720
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	30,177
Total Domestic Corporation Tax	30,227
Domestic Tax over (under) Foreign Tax	27,507
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	3,147
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-3,097
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	64,880
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	105,710
Total Domestic Corporation Tax	105,760
Domestic Tax over (under) Foreign Tax	40,880

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	287
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-237
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	81,291
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	55,836
Total Domestic Corporation Tax	55,886
Domestic Tax over (under) Foreign Tax	-25,405

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	Total
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	7,608
Domestic Corporation (As If)	
Franchise Tax	200
Shares Tax	86,688
Total Domestic Corporation Tax	86,888
Domestic Tax over (under) Foreign Tax	79,280
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	3,172
Domestic Corporation (As If)	
Franchise Tax	100
Shares Tax	0
Total Domestic Corporation Tax	100
Domestic Tax over (under) Foreign Tax	-3,072
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	304,268
Domestic Corporation (As If)	
Franchise Tax	350
Shares Tax	264,678
Total Domestic Corporation Tax	265,028
Domestic Tax over (under) Foreign Tax	-39,240

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	10,939
Domestic Corporation (As If)	
Franchise Tax	113,670
Shares Tax	12,176
Total Domestic Corporation Tax	125,846
Domestic Tax over (under) Foreign Tax	114,907
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,242
Domestic Corporation (As If)	
Franchise Tax	1,025
Shares Tax	22,367
Total Domestic Corporation Tax	23,392
Domestic Tax over (under) Foreign Tax	19,150
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	555,951
Domestic Corporation (As If)	
Franchise Tax	2,292,208
Shares Tax	0
Total Domestic Corporation Tax	2,292,208
Domestic Tax over (under) Foreign Tax	1,736,257
Total Domestic Tax over (under) Foreign Tax	39,117,756

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	6,776
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	33,541
Total Domestic Corporation Tax	33,591
Domestic Tax over (under) Foreign Tax	26,815
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,756
Domestic Corporation (As If)	
Franchise Tax	1,015
Shares Tax	15,689
Total Domestic Corporation Tax	16,704
Domestic Tax over (under) Foreign Tax	11,948
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	557,066
Domestic Corporation (As If)	
Franchise Tax	2,172,208
Shares Tax	0
Total Domestic Corporation Tax	2,172,208
Domestic Tax over (under) Foreign Tax	1,615,142
Total Domestic Tax over (under) Foreign Tax	50,834,052

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	5,840
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-5,790
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,835
Domestic Corporation (As If)	
Franchise Tax	1,015
Shares Tax	0
Total Domestic Corporation Tax	1,015
Domestic Tax over (under) Foreign Tax	-3,820
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	570,472
Domestic Corporation (As If)	
Franchise Tax	2,452,208
Shares Tax	0
Total Domestic Corporation Tax	2,452,208
Domestic Tax over (under) Foreign Tax	1,881,736
Total Domestic Tax over (under) Foreign Tax	139,285,955

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	7,769
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-7,719
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	2,753
Domestic Corporation (As If)	
Franchise Tax	1,015
Shares Tax	3,597
Total Domestic Corporation Tax	4,612
Domestic Tax over (under) Foreign Tax	1,859
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	574,252
Domestic Corporation (As If)	
Franchise Tax	1,845,540
Shares Tax	0
Total Domestic Corporation Tax	1,845,540
Domestic Tax over (under) Foreign Tax	1,271,288
Total Domestic Tax over (under) Foreign Tax	134,460,504

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	37,952
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	9,480
Total Domestic Corporation Tax	9,530
Domestic Tax over (under) Foreign Tax	-28,422
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	3,610
Domestic Corporation (As If)	
Franchise Tax	980
Shares Tax	0
Total Domestic Corporation Tax	980
Domestic Tax over (under) Foreign Tax	-2,630
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	573,792
Domestic Corporation (As If)	
Franchise Tax	1,812,208
Shares Tax	0
Total Domestic Corporation Tax	1,812,208
Domestic Tax over (under) Foreign Tax	1,238,416
Total Domestic Tax over (under) Foreign Tax	151,284,951

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	24,108
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-24,058
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	2,753
Domestic Corporation (As If)	
Franchise Tax	980
Shares Tax	0
Total Domestic Corporation Tax	980
Domestic Tax over (under) Foreign Tax	-1,773
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	571,327
Domestic Corporation (As If)	
Franchise Tax	1,812,208
Shares Tax	0
Total Domestic Corporation Tax	1,812,208
Domestic Tax over (under) Foreign Tax	1,240,881
Total Domestic Tax over (under) Foreign Tax	188,163,006

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	15,199
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-15,149
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Franchise Tax	50
Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	567,946
Domestic Corporation (As If)	
Franchise Tax	1,812,208
Shares Tax	0
Total Domestic Corporation Tax	1,812,208
Domestic Tax over (under) Foreign Tax	1,244,262
Total Domestic Tax over (under) Foreign Tax	101,843,802

Summary of Tax Differences in the "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	Total
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	108,583
Domestic Corporation (As If)	
Franchise Tax	113,970
Shares Tax	55,197
Total Domestic Corporation Tax	169,167
Domestic Tax over (under) Foreign Tax	60,584
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	22,974
Domestic Corporation (As If)	
Franchise Tax	6,080
Shares Tax	41,653
Total Domestic Corporation Tax	47,733
Domestic Tax over (under) Foreign Tax	24,759
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	3,970,806
Domestic Corporation (As If)	
Franchise Tax	14,198,788
Shares Tax	0
Total Domestic Corporation Tax	14,198,788
Domestic Tax over (under) Foreign Tax	10,227,982
Total Domestic Tax over (under) Foreign Tax	804,990,026

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	4,294,605,803
Domestic Franchise Tax	42,946,058
Domestic Shares Tax:	
Total value of all shares of stock	6,604,398,291
Deductions:	
Book value of real & tangible personal property	20,216,506,645
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	20,216,506,645
Book value of merchandise held for sale	152,915,582
Cost of domestic capital stock owned	89,710,333
Total deductions	20,459,132,560
Total value of all shares of stock remaining for assessment	-13,854,734,269
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	42,946,058
Domestic Tax over (under) Foreign Tax	42,946,033

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Telecommunications, Inc. (Q: 11-12-91)	
Foreign Corporation: Franchise Tax (As Paid)	6,371,607
Domestic Corporation (As If)	
Capital Stock	7,318,959,147
Domestic Franchise Tax	73,189,591
Domestic Shares Tax:	
Total value of all shares of stock	11,653,592,076
Deductions:	
Book value of real & tangible personal property	37,213,279,384
Book value of Alabama real & tangible personal property	-3,760,348,233
Book value of real & tangible personal property in other states	33,452,931,151
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	33,452,931,151
Total value of all shares of stock remaining for assessment	-21,799,339,075
State assessment (not less than zero)	0
County assessments	-752,069,647
Residue of total value of stock for assessment (not < 0)	-752,069,647
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	73,189,591
Domestic Tax over (under) Foreign Tax	66,817,984

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	309,778,000
Domestic Franchise Tax	3,097,780
Domestic Shares Tax:	
Total value of all shares of stock	10,198,051,000
Deductions:	
Book value of real & tangible personal property	6,650,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	6,650,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	9,809,588,000
Total deductions	9,816,238,000
Total value of all shares of stock remaining for assessment	381,813,000
State assessment (not less than zero)	76,362,600
County assessments	0
Residue of total value of stock for assessment (not < 0)	76,362,600
N/A *Domestic Shares Tax*	5,307,201
Total Domestic Corporation Tax	8,404,981
Domestic Tax over (under) Foreign Tax	8,404,956

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	322,491,000
Domestic Franchise Tax	3,224,910
Domestic Shares Tax:	
Total value of all shares of stock	11,264,638,000
Deductions:	
Book value of real & tangible personal property	10,250,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	10,250,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	9,869,073,672
Total deductions	9,879,323,672
Total value of all shares of stock remaining for assessment	1,385,314,328
State assessment (not less than zero)	277,062,866
County assessments	0
Residue of total value of stock for assessment (not < 0)	277,062,866
N/A *Domestic Shares Tax*	19,255,869
Total Domestic Corporation Tax	22,480,779
Domestic Tax over (under) Foreign Tax	22,480,754

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	485,878,000
Domestic Franchise Tax	4,858,780
Domestic Shares Tax:	
Total value of all shares of stock	11,978,413,000
Deductions:	
Book value of real & tangible personal property	9,733,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	9,733,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	4,368,756,571
Total deductions	4,378,489,571
Total value of all shares of stock remaining for assessment	7,599,923,429
State assessment (not less than zero)	1,519,984,686
County assessments	0
Residue of total value of stock for assessment (not < 0)	1,519,984,686
N/A *Domestic Shares Tax*	105,638,936
Total Domestic Corporation Tax	110,497,716
Domestic Tax over (under) Foreign Tax	110,497,691

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	485,990,000
Domestic Franchise Tax	4,859,900
Domestic Shares Tax:	
Total value of all shares of stock	11,840,689,000
Deductions:	
Book value of real & tangible personal property	22,458,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	22,458,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	4,533,727,252
Total deductions	4,556,185,252
Total value of all shares of stock remaining for assessment	7,284,503,748
State assessment (not less than zero)	1,456,900,750
County assessments	0
Residue of total value of stock for assessment (not < 0)	1,456,900,750
N/A *Domestic Shares Tax*	101,254,602
Total Domestic Corporation Tax	106,114,502
Domestic Tax over (under) Foreign Tax	106,114,477

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	545
Domestic Corporation (As If)	
Capital Stock	486,229,000
Domestic Franchise Tax	4,862,290
Domestic Shares Tax:	
Total value of all shares of stock	13,103,506,000
Deductions:	
Book value of real & tangible personal property	18,058,000
Book value of Alabama real & tangible personal property	-23,804
Book value of real & tangible personal property in other states	18,034,196
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	4,669,877,587
Total deductions	4,687,911,783
Total value of all shares of stock remaining for assessment	8,415,594,217
State assessment (not less than zero)	1,683,118,843
County assessments	-4,761
Residue of total value of stock for assessment (not < 0)	1,683,114,082
N/A *Domestic Shares Tax*	116,976,429
Total Domestic Corporation Tax	121,838,719
Domestic Tax over (under) Foreign Tax	121,838,174

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	486,647,037
Domestic Franchise Tax	4,866,470
Domestic Shares Tax:	
Total value of all shares of stock	12,671,762,633
Deductions:	
Book value of real & tangible personal property	17,194,131
Book value of Alabama real & tangible personal property	-20,339
Book value of real & tangible personal property in other states	17,173,792
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	4,736,291,092
Total deductions	4,753,464,884
Total value of all shares of stock remaining for assessment	7,918,297,749
State assessment (not less than zero)	1,583,659,550
County assessments	-4,068
Residue of total value of stock for assessment (not < 0)	1,583,655,482
N/A *Domestic Shares Tax*	110,064,056
Total Domestic Corporation Tax	114,930,526
Domestic Tax over (under) Foreign Tax	114,930,501

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Corporation	
Foreign Corporation: Franchise Tax (As Paid)	5,311
Domestic Corporation (As If)	
Capital Stock	488,286,956
Domestic Franchise Tax	4,882,870
Domestic Shares Tax:	
Total value of all shares of stock	13,115,856,792
Deductions:	
Book value of real & tangible personal property	15,707,665
Book value of Alabama real & tangible personal property	-31,606
Book value of real & tangible personal property in other states	15,676,059
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	11,350,893,834
Total deductions	11,366,569,893
Total value of all shares of stock remaining for assessment	1,749,286,899
State assessment (not less than zero)	349,857,380
County assessments	-6,321
Residue of total value of stock for assessment (not < 0)	349,851,059
N/A *Domestic Shares Tax*	24,314,649
Total Domestic Corporation Tax	29,197,519
Domestic Tax over (under) Foreign Tax	29,192,208

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	4,952,697
Domestic Corporation (As If)	
Capital Stock	2,933,410,688
Domestic Franchise Tax	29,334,107
Domestic Shares Tax:	
Total value of all shares of stock	4,657,099,274
Deductions:	
Book value of real & tangible personal property	11,896,494,229
Book value of Alabama real & tangible personal property	-2,572,569,291
Book value of real & tangible personal property in other states	9,323,924,938
Book value of merchandise held for sale	104,949,072
Cost of domestic capital stock owned	26,798,466
Total deductions	9,455,672,476
Total value of all shares of stock remaining for assessment	-4,798,573,202
State assessment (not less than zero)	0
County assessments	-514,513,858
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	29,334,107
Domestic Tax over (under) Foreign Tax	24,381,410

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	4,995,844
Domestic Corporation (As If)	
Capital Stock	2,948,920,303
Domestic Franchise Tax	29,489,203
Domestic Shares Tax:	
Total value of all shares of stock	4,666,716,143
Deductions:	
Book value of real & tangible personal property	12,661,318,891
Book value of Alabama real & tangible personal property	-2,765,244,707
Book value of real & tangible personal property in other states	9,896,074,184
Book value of merchandise held for sale	103,779,963
Cost of domestic capital stock owned	42,840,118
Total deductions	10,042,694,265
Total value of all shares of stock remaining for assessment	-5,375,978,122
State assessment (not less than zero)	0
County assessments	-553,048,941
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	29,489,203
Domestic Tax over (under) Foreign Tax	24,493,359

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	4,927,214
Domestic Corporation (As If)	
Capital Stock	2,966,130,486
Domestic Franchise Tax	29,661,305
Domestic Shares Tax:	
Total value of all shares of stock	4,650,522,281
Deductions:	
Book value of real & tangible personal property	13,314,381,056
Book value of Alabama real & tangible personal property	-2,947,644,193
Book value of real & tangible personal property in other states	10,366,736,863
Book value of merchandise held for sale	54,476,399
Cost of domestic capital stock owned	80,263,546
Total deductions	10,501,476,808
Total value of all shares of stock remaining for assessment	-5,850,954,527
State assessment (not less than zero)	0
County assessments	-589,528,839
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	29,661,305
Domestic Tax over (under) Foreign Tax	24,734,091

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	5,219,546
Domestic Corporation (As If)	
Capital Stock	2,984,630,486
Domestic Franchise Tax	29,846,305
Domestic Shares Tax:	
Total value of all shares of stock	4,989,517,462
Deductions:	
Book value of real & tangible personal property	14,040,125,535
Book value of Alabama real & tangible personal property	-3,149,410,759
Book value of real & tangible personal property in other states	10,890,714,776
Book value of merchandise held for sale	58,557,238
Cost of domestic capital stock owned	118,059,135
Total deductions	11,067,331,149
Total value of all shares of stock remaining for assessment	-6,077,813,687
State assessment (not less than zero)	0
County assessments	-629,882,152
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	29,846,305
Domestic Tax over (under) Foreign Tax	24,626,759

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	5,334,015
Domestic Corporation (As If)	
Capital Stock	3,024,352,000
Domestic Franchise Tax	30,243,520
Domestic Shares Tax:	
Total value of all shares of stock	6,349,956,000
Deductions:	
Book value of real & tangible personal property	9,345,291,000
Book value of Alabama real & tangible personal property	-2,132,931,837
Book value of real & tangible personal property in other states	7,212,359,163
Book value of merchandise held for sale	83,962,678
Cost of domestic capital stock owned	122,495,930
Total deductions	7,418,817,771
Total value of all shares of stock remaining for assessment	-1,068,861,771
State assessment (not less than zero)	0
County assessments	-426,586,367
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	30,243,520
Domestic Tax over (under) Foreign Tax	24,909,505

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	5,210,339
Domestic Corporation (As If)	
Capital Stock	3,024,352,334
Domestic Franchise Tax	30,243,523
Domestic Shares Tax:	
Total value of all shares of stock	4,808,691,276
Deductions:	
Book value of real & tangible personal property	9,379,448,000
Book value of Alabama real & tangible personal property	-2,158,146,454
Book value of real & tangible personal property in other states	7,221,301,546
Book value of merchandise held for sale	80,193,000
Cost of domestic capital stock owned	89,709,883
Total deductions	7,391,204,429
Total value of all shares of stock remaining for assessment	-2,582,513,153
State assessment (not less than zero)	0
County assessments	-431,629,291
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	30,243,523
Domestic Tax over (under) Foreign Tax	25,033,184

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
South Central Bell Telephone Company (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	0
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	0
Deductions:	
Book value of real & tangible personal property	0
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	30,950
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	29,938,327
Deductions:	
Book value of real & tangible personal property	5,440,206
Book value of Alabama real & tangible personal property	-41,279
Book value of real & tangible personal property in other states	5,398,927
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	5,398,927
Total value of all shares of stock remaining for assessment	24,539,400
State assessment (not less than zero)	4,907,880
County assessments	-8,256
Residue of total value of stock for assessment (not < 0)	4,899,624
N/A *Domestic Shares Tax*	340,524
Total Domestic Corporation Tax	340,574
Domestic Tax over (under) Foreign Tax	309,624

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	108,774
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	41,302,500
Deductions:	
Book value of real & tangible personal property	91,086,000
Book value of Alabama real & tangible personal property	-11,076,534
Book value of real & tangible personal property in other states	80,009,466
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	80,009,466
Total value of all shares of stock remaining for assessment	-38,706,966
State assessment (not less than zero)	0
County assessments	-2,215,307
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-108,724

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	139,893
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	93,070,387
Deductions:	
Book value of real & tangible personal property	98,435,000
Book value of Alabama real & tangible personal property	-18,632,301
Book value of real & tangible personal property in other states	79,802,699
Book value of merchandise held for sale	101,448,000
Cost of domestic capital stock owned	0
Total deductions	181,250,699
Total value of all shares of stock remaining for assessment	-88,180,312
State assessment (not less than zero)	0
County assessments	-3,726,460
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-139,843

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	135,610
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	93,845,376
Deductions:	
Book value of real & tangible personal property	112,985,469
Book value of Alabama real & tangible personal property	-27,859,885
Book value of real & tangible personal property in other states	85,125,584
Book value of merchandise held for sale	116,440,379
Cost of domestic capital stock owned	0
Total deductions	201,565,963
Total value of all shares of stock remaining for assessment	-107,720,587
State assessment (not less than zero)	0
County assessments	-5,571,977
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-135,560

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	205,525
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	199,464,259
Deductions:	
Book value of real & tangible personal property	120,346,979
Book value of Alabama real & tangible personal property	-19,490,253
Book value of real & tangible personal property in other states	100,856,726
Book value of merchandise held for sale	128,430,648
Cost of domestic capital stock owned	3,519,888
Total deductions	232,807,262
Total value of all shares of stock remaining for assessment	-33,343,003
State assessment (not less than zero)	0
County assessments	-3,898,051
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-205,475

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	206,333
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	179,420,666
Deductions:	
Book value of real & tangible personal property	116,095,920
Book value of Alabama real & tangible personal property	-27,283,729
Book value of real & tangible personal property in other states	88,812,191
Book value of merchandise held for sale	89,704,570
Cost of domestic capital stock owned	11,762,377
Total deductions	190,279,138
Total value of all shares of stock remaining for assessment	-10,858,472
State assessment (not less than zero)	0
County assessments	-5,456,746
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-206,283

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Services, Inc. (M: 12-31-91)	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	0
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	0
Deductions:	
Book value of real & tangible personal property	0
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-299,000
Deductions:	
Book value of real & tangible personal property	2,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	2,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	2,000
Total value of all shares of stock remaining for assessment	-301,000
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-813,000
Deductions:	
Book value of real & tangible personal property	160,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	160,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	160,000
Total value of all shares of stock remaining for assessment	-973,000
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-139,000
Deductions:	
Book value of real & tangible personal property	688,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	688,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	688,000
Total value of all shares of stock remaining for assessment	-827,000
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	130,334
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	4,803,000
Deductions:	
Book value of real & tangible personal property	4,947,000
Book value of Alabama real & tangible personal property	-664,382
Book value of real & tangible personal property in other states	4,282,618
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	4,282,618
Total value of all shares of stock remaining for assessment	520,382
State assessment (not less than zero)	104,076
County assessments	-132,876
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-130,284

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	16,908
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	7,904,000
Deductions:	
Book value of real & tangible personal property	5,051,000
Book value of Alabama real & tangible personal property	-676,329
Book value of real & tangible personal property in other states	4,374,671
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	4,374,671
Total value of all shares of stock remaining for assessment	3,529,329
State assessment (not less than zero)	705,866
County assessments	-135,266
Residue of total value of stock for assessment (not < 0)	570,600
N/A *Domestic Shares Tax*	39,657
Total Domestic Corporation Tax	39,707
Domestic Tax over (under) Foreign Tax	22,799

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	28,539
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	10,489,000
Deductions:	
Book value of real & tangible personal property	436,000
Book value of Alabama real & tangible personal property	-60,386
Book value of real & tangible personal property in other states	375,614
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	375,614
Total value of all shares of stock remaining for assessment	10,113,386
State assessment (not less than zero)	2,022,677
County assessments	-12,077
Residue of total value of stock for assessment (not < 0)	2,010,600
N/A *Domestic Shares Tax*	139,737
Total Domestic Corporation Tax	139,787
Domestic Tax over (under) Foreign Tax	111,248

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Financial Services Corporation	
Foreign Corporation: Franchise Tax (As Paid)	17,172
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	11,492,000
Deductions:	
Book value of real & tangible personal property	325,000
Book value of Alabama real & tangible personal property	-41,919
Book value of real & tangible personal property in other states	283,081
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	283,081
Total value of all shares of stock remaining for assessment	11,208,919
State assessment (not less than zero)	2,241,784
County assessments	-8,384
Residue of total value of stock for assessment (not < 0)	2,233,400
N/A *Domestic Shares Tax*	155,221
Total Domestic Corporation Tax	155,271
Domestic Tax over (under) Foreign Tax	138,099

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	60,038
Domestic Corporation (As If)	
Capital Stock	182,584,000
Domestic Franchise Tax	1,825,840
Domestic Shares Tax:	
Total value of all shares of stock	182,907,000
Deductions:	
Book value of real & tangible personal property	10,189,000
Book value of Alabama real & tangible personal property	-1,227,114
Book value of real & tangible personal property in other states	8,961,886
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	8,961,886
Total value of all shares of stock remaining for assessment	173,945,114
State assessment (not less than zero)	34,789,023
County assessments	-245,423
Residue of total value of stock for assessment (not < 0)	34,543,600
N/A *Domestic Shares Tax*	2,400,780
Total Domestic Corporation Tax	4,226,620
Domestic Tax over (under) Foreign Tax	4,166,582

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	59,922
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	181,263,587
Deductions:	
Book value of real & tangible personal property	9,553,000
Book value of Alabama real & tangible personal property	-786,038
Book value of real & tangible personal property in other states	8,766,962
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	8,766,962
Total value of all shares of stock remaining for assessment	172,496,625
State assessment (not less than zero)	34,499,325
County assessments	-157,208
Residue of total value of stock for assessment (not < 0)	34,342,117
N/A *Domestic Shares Tax*	2,386,777
Total Domestic Corporation Tax	2,386,827
Domestic Tax over (under) Foreign Tax	2,326,905

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	55,586
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	181,265,000
Deductions:	
Book value of real & tangible personal property	8,934,000
Book value of Alabama real & tangible personal property	-1,084,247
Book value of real & tangible personal property in other states	7,849,753
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,849,753
Total value of all shares of stock remaining for assessment	173,415,247
State assessment (not less than zero)	34,683,049
County assessments	-216,849
Residue of total value of stock for assessment (not < 0)	34,466,200
N/A *Domestic Shares Tax*	2,395,401
Total Domestic Corporation Tax	2,395,451
Domestic Tax over (under) Foreign Tax	2,339,865

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	56,659
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	211,263,587
Deductions:	
Book value of real & tangible personal property	11,586,000
Book value of Alabama real & tangible personal property	-606,940
Book value of real & tangible personal property in other states	10,979,060
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	10,979,060
Total value of all shares of stock remaining for assessment	200,284,527
State assessment (not less than zero)	40,056,905
County assessments	-121,388
Residue of total value of stock for assessment (not < 0)	39,935,517
N/A *Domestic Shares Tax*	2,775,518
Total Domestic Corporation Tax	2,775,568
Domestic Tax over (under) Foreign Tax	2,718,909

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	71,861
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	266,568,534
Deductions:	
Book value of real & tangible personal property	11,709,000
Book value of Alabama real & tangible personal property	-445,794
Book value of real & tangible personal property in other states	11,263,206
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	11,263,206
Total value of all shares of stock remaining for assessment	255,305,328
State assessment (not less than zero)	51,061,066
County assessments	-89,159
Residue of total value of stock for assessment (not < 0)	50,971,907
N/A Domestic Shares Tax	3,542,548
Total Domestic Corporation Tax	3,542,598
Domestic Tax over (under) Foreign Tax	3,470,737

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	75,421
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	313,851,000
Deductions:	
Book value of real & tangible personal property	15,768,000
Book value of Alabama real & tangible personal property	-1,432,586
Book value of real & tangible personal property in other states	14,335,414
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	14,335,414
Total value of all shares of stock remaining for assessment	299,515,586
State assessment (not less than zero)	59,903,117
County assessments	-286,517
Residue of total value of stock for assessment (not < 0)	59,616,600
N/A Domestic Shares Tax	4,143,354
Total Domestic Corporation Tax	4,143,404
Domestic Tax over (under) Foreign Tax	4,067,983

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Advertising & Publishing Corporation	
Foreign Corporation: Franchise Tax (As Paid)	65,829
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	342,978,437
Deductions:	
Book value of real & tangible personal property	15,085,000
Book value of Alabama real & tangible personal property	-773,064
Book value of real & tangible personal property in other states	14,311,936
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	14,311,936
Total value of all shares of stock remaining for assessment	328,666,501
State assessment (not less than zero)	65,733,300
County assessments	-154,613
Residue of total value of stock for assessment (not < 0)	65,578,687
N/A *Domestic Shares Tax*	4,557,719
Total Domestic Corporation Tax	4,557,769
Domestic Tax over (under) Foreign Tax	4,491,940

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	500
Deductions:	
Book value of real & tangible personal property	0
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	500
State assessment (not less than zero)	100
County assessments	0
Residue of total value of stock for assessment (not < 0)	100
N/A *Domestic Shares Tax*	7
Total Domestic Corporation Tax	57
Domestic Tax over (under) Foreign Tax	32

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,576
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	4,434,000
Deductions:	
Book value of real & tangible personal property	369,000
Book value of Alabama real & tangible personal property	-193,408
Book value of real & tangible personal property in other states	175,592
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	175,592
Total value of all shares of stock remaining for assessment	4,258,408
State assessment (not less than zero)	851,682
County assessments	-38,682
Residue of total value of stock for assessment (not < 0)	813,000
N/A *Domestic Shares Tax*	56,504
Total Domestic Corporation Tax	56,554
Domestic Tax over (under) Foreign Tax	51,978

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	2,720
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	2,618,000
Deductions:	
Book value of real & tangible personal property	447,000
Book value of Alabama real & tangible personal property	-199,872
Book value of real & tangible personal property in other states	247,128
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	247,128
Total value of all shares of stock remaining for assessment	2,370,872
State assessment (not less than zero)	474,174
County assessments	-39,974
Residue of total value of stock for assessment (not < 0)	434,200
N/A *Domestic Shares Tax*	30,177
Total Domestic Corporation Tax	30,227
Domestic Tax over (under) Foreign Tax	27,507

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Resources, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	287
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-15,000
Deductions:	
Book value of real & tangible personal property	7,000
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	7,000
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,000
Total value of all shares of stock remaining for assessment	-22,000
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-237

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	
Domestic Corporation (As If)	
Capital Stock	
Domestic Franchise Tax	0
Domestic Shares Tax:	
Total value of all shares of stock	
Deductions:	
Book value of real & tangible personal property	
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	
Cost of domestic capital stock owned	
Total deductions	0
Total value of all shares of stock remaining for assessment	0
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	0
Domestic Tax over (under) Foreign Tax	0

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	3,147
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-11,762,377
Deductions:	
Book value of real & tangible personal property	0
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	-11,762,377
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-3,097

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
BellSouth Products, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-806,987
Deductions:	
Book value of real & tangible personal property	0
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	2,523,042
Cost of domestic capital stock owned	0
Total deductions	2,523,042
Total value of all shares of stock remaining for assessment	-3,330,029
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	15,205
Domestic Corporation (As If)	
Capital Stock	1
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	4,201,816
Deductions:	
Book value of real & tangible personal property	4,486,696
Book value of Alabama real & tangible personal property	-4,486,696
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	4,201,816
State assessment (not less than zero)	840,363
County assessments	-897,339
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-15,155

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	13,819
Domestic Corporation (As If)	
Capital Stock	1
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	4,552,064
Deductions:	
Book value of real & tangible personal property	4,437,203
Book value of Alabama real & tangible personal property	-4,437,203
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	4,552,064
State assessment (not less than zero)	910,413
County assessments	-887,441
Residue of total value of stock for assessment (not < 0)	22,972
N/A Domestic Shares Tax	1,597
Total Domestic Corporation Tax	1,647
Domestic Tax over (under) Foreign Tax	-12,172

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	43,602
Domestic Corporation (As If)	
Capital Stock	1
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	10,894,149
Deductions:	
Book value of real & tangible personal property	9,055,894
Book value of Alabama real & tangible personal property	-9,055,894
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	10,894,149
State assessment (not less than zero)	2,178,830
County assessments	-1,811,179
Residue of total value of stock for assessment (not < 0)	367,651
N/A Domestic Shares Tax	25,552
Total Domestic Corporation Tax	25,602
Domestic Tax over (under) Foreign Tax	-18,000

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	40,402
Domestic Corporation (As If)	
Capital Stock	0
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	13,389,444
Deductions:	
Book value of real & tangible personal property	10,432,979
Book value of Alabama real & tangible personal property	-10,432,979
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	13,389,444
State assessment (not less than zero)	2,677,889
County assessments	-2,086,596
Residue of total value of stock for assessment (not < 0)	591,293
N/A *Domestic Shares Tax*	41,095
Total Domestic Corporation Tax	41,145
Domestic Tax over (under) Foreign Tax	743

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	45,069
Domestic Corporation (As If)	
Capital Stock	0
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	15,014,123
Deductions:	
Book value of real & tangible personal property	12,504,179
Book value of Alabama real & tangible personal property	-12,504,179
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	15,014,123
State assessment (not less than zero)	3,002,825
County assessments	-2,500,836
Residue of total value of stock for assessment (not < 0)	501,989
N/A *Domestic Shares Tax*	34,888
Total Domestic Corporation Tax	34,938
Domestic Tax over (under) Foreign Tax	-10,131

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	64,880
Domestic Corporation (As If)	
Capital Stock	0
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	21,578,000
Deductions:	
Book value of real & tangible personal property	13,973,000
Book value of Alabama real & tangible personal property	-13,973,000
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	21,578,000
State assessment (not less than zero)	4,315,600
County assessments	-2,794,600
Residue of total value of stock for assessment (not < 0)	1,521,000
N/A Domestic Shares Tax	105,710
Total Domestic Corporation Tax	105,760
Domestic Tax over (under) Foreign Tax	40,880

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
Alabama Cellular Services, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	81,291
Domestic Corporation (As If)	
Capital Stock	0
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	27,097,000
Deductions:	
Book value of real & tangible personal property	23,080,000
Book value of Alabama real & tangible personal property	-23,080,000
Book value of real & tangible personal property in other states	0
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	0
Total value of all shares of stock remaining for assessment	27,097,000
State assessment (not less than zero)	5,419,400
County assessments	-4,616,000
Residue of total value of stock for assessment (not < 0)	803,400
N/A Domestic Shares Tax	55,836
Total Domestic Corporation Tax	55,886
Domestic Tax over (under) Foreign Tax	-25,405

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
Sunlink Corporation	-
Foreign Corporation: Franchise Tax (As Paid)	10,939
Domestic Corporation (As If)	
Capital Stock	11,367,000
Domestic Franchise Tax	113,670
Domestic Shares Tax:	
Total value of all shares of stock	11,366,000
Deductions:	
Book value of real & tangible personal property	10,490,000
Book value of Alabama real & tangible personal property	-2,819,961
Book value of real & tangible personal property in other states	7,670,039
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,670,039
Total value of all shares of stock remaining for assessment	3,695,961
State assessment (not less than zero)	739,192
County assessments	-563,992
Residue of total value of stock for assessment (not < 0)	175,200
N/A *Domestic Shares Tax*	12,176
Total Domestic Corporation Tax	125,846
Domestic Tax over (under) Foreign Tax	114,907

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	6,776
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	11,360,000
Deductions:	
Book value of real & tangible personal property	8,947,000
Book value of Alabama real & tangible personal property	-2,764,195
Book value of real & tangible personal property in other states	6,182,805
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	6,182,805
Total value of all shares of stock remaining for assessment	5,177,195
State assessment (not less than zero)	1,035,439
County assessments	-552,839
Residue of total value of stock for assessment (not < 0)	482,600
N/A *Domestic Shares Tax*	33,541
Total Domestic Corporation Tax	33,591
Domestic Tax over (under) Foreign Tax	26,815

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	5,840
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	11,368,000
Deductions:	
Book value of real & tangible personal property	11,780,000
Book value of Alabama real & tangible personal property	-2,695,756
Book value of real & tangible personal property in other states	9,084,244
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	9,084,244
Total value of all shares of stock remaining for assessment	2,283,756
State assessment (not less than zero)	456,751
County assessments	-539,151
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-5,790

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	7,769
Domestic Corporation (As If)	
Capital Stock	1,000
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	11,355,000
Deductions:	
Book value of real & tangible personal property	18,249,000
Book value of Alabama real & tangible personal property	-2,356,241
Book value of real & tangible personal property in other states	15,892,759
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	15,892,759
Total value of all shares of stock remaining for assessment	-4,537,759
State assessment (not less than zero)	0
County assessments	-471,248
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-7,719

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	37,952
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	24,751,000
Deductions:	
Book value of real & tangible personal property	24,069,000
Book value of Alabama real & tangible personal property	-7,590,075
Book value of real & tangible personal property in other states	16,478,925
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	16,478,925
Total value of all shares of stock remaining for assessment	8,272,075
State assessment (not less than zero)	1,654,415
County assessments	-1,518,015
Residue of total value of stock for assessment (not < 0)	136,400
N/A *Domestic Shares Tax*	9,480
Total Domestic Corporation Tax	9,530
Domestic Tax over (under) Foreign Tax	-28,422

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	24,108
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	24,739,593
Deductions:	
Book value of real & tangible personal property	30,581,000
Book value of Alabama real & tangible personal property	-7,498,806
Book value of real & tangible personal property in other states	23,082,194
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	23,082,194
Total value of all shares of stock remaining for assessment	1,657,399
State assessment (not less than zero)	331,480
County assessments	-1,499,761
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-24,058

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
Sunlink Corporation	
Foreign Corporation: Franchise Tax (As Paid)	15,199
Domestic Corporation (As If)	
Capital Stock	500
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	25,791,479
Deductions:	
Book value of real & tangible personal property	29,731,000
Book value of Alabama real & tangible personal property	-7,467,331
Book value of real & tangible personal property in other states	22,263,669
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	22,263,669
Total value of all shares of stock remaining for assessment	3,527,810
State assessment (not less than zero)	705,562
County assessments	-1,493,466
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	-15,149

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,242
Domestic Corporation (As If)	
Capital Stock	102,500
Domestic Franchise Tax	1,025
Domestic Shares Tax:	
Total value of all shares of stock	2,687,104
Deductions:	
Book value of real & tangible personal property	1,056,754
Book value of Alabama real & tangible personal property	-434,238
Book value of real & tangible personal property in other states	622,516
Book value of merchandise held for sale	21,220
Cost of domestic capital stock owned	0
Total deductions	643,736
Total value of all shares of stock remaining for assessment	2,043,368
State assessment (not less than zero)	408,674
County assessments	-86,848
Residue of total value of stock for assessment (not < 0)	321,826
N/A Domestic Shares Tax	22,367
Total Domestic Corporation Tax	23,392
Domestic Tax over (under) Foreign Tax	19,150

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,756
Domestic Corporation (As If)	
Capital Stock	101,500
Domestic Franchise Tax	1,015
Domestic Shares Tax:	
Total value of all shares of stock	2,838,978
Deductions:	
Book value of real & tangible personal property	1,672,700
Book value of Alabama real & tangible personal property	-594,272
Book value of real & tangible personal property in other states	1,078,428
Book value of merchandise held for sale	37,545
Cost of domestic capital stock owned	0
Total deductions	1,115,973
Total value of all shares of stock remaining for assessment	1,723,005
State assessment (not less than zero)	344,601
County assessments	-118,854
Residue of total value of stock for assessment (not < 0)	225,747
N/A *Domestic Shares Tax*	15,689
Total Domestic Corporation Tax	16,704
Domestic Tax over (under) Foreign Tax	11,948

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	4,835
Domestic Corporation (As If)	
Capital Stock	101,500
Domestic Franchise Tax	1,015
Domestic Shares Tax:	
Total value of all shares of stock	2,339,561
Deductions:	
Book value of real & tangible personal property	2,383,599
Book value of Alabama real & tangible personal property	-672,193
Book value of real & tangible personal property in other states	1,711,406
Book value of merchandise held for sale	200,285
Cost of domestic capital stock owned	0
Total deductions	1,911,691
Total value of all shares of stock remaining for assessment	427,870
State assessment (not less than zero)	85,574
County assessments	-134,439
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	1,015
Domestic Tax over (under) Foreign Tax	-3,820

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	2,753
Domestic Corporation (As If)	
Capital Stock	101,500
Domestic Franchise Tax	1,015
Domestic Shares Tax:	
Total value of all shares of stock	3,482,303
Deductions:	
Book value of real & tangible personal property	2,818,688
Book value of Alabama real & tangible personal property	-1,101,974
Book value of real & tangible personal property in other states	1,716,714
Book value of merchandise held for sale	404,854
Cost of domestic capital stock owned	0
Total deductions	2,121,568
Total value of all shares of stock remaining for assessment	1,360,735
State assessment (not less than zero)	272,147
County assessments	-220,395
Residue of total value of stock for assessment (not < 0)	51,752
N/A *Domestic Shares Tax*	3,597
Total Domestic Corporation Tax	4,612
Domestic Tax over (under) Foreign Tax	1,859

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	3,610
Domestic Corporation (As If)	
Capital Stock	98,000
Domestic Franchise Tax	980
Domestic Shares Tax:	
Total value of all shares of stock	2,867,000
Deductions:	
Book value of real & tangible personal property	2,835,000
Book value of Alabama real & tangible personal property	-1,108,485
Book value of real & tangible personal property in other states	1,726,515
Book value of merchandise held for sale	133,000
Cost of domestic capital stock owned	0
Total deductions	1,859,515
Total value of all shares of stock remaining for assessment	1,007,485
State assessment (not less than zero)	201,497
County assessments	-221,697
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	980
Domestic Tax over (under) Foreign Tax	-2,630

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	2,753
Domestic Corporation (As If)	
Capital Stock	98,000
Domestic Franchise Tax	980
Domestic Shares Tax:	
Total value of all shares of stock	1,401,000
Deductions:	
Book value of real & tangible personal property	2,471,000
Book value of Alabama real & tangible personal property	-840,243
Book value of real & tangible personal property in other states	1,630,757
Book value of merchandise held for sale	78,000
Cost of domestic capital stock owned	0
Total deductions	1,708,757
Total value of all shares of stock remaining for assessment	-307,757
State assessment (not less than zero)	0
County assessments	-168,049
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	980
Domestic Tax over (under) Foreign Tax	-1,773

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
TechSouth, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	25
Domestic Corporation (As If)	
Capital Stock	4,558
Domestic Franchise Tax	50
Domestic Shares Tax:	
Total value of all shares of stock	-196,951
Deductions:	
Book value of real & tangible personal property	1,838,000
Book value of Alabama real & tangible personal property	-1,072,468
Book value of real & tangible personal property in other states	765,532
Book value of merchandise held for sale	21,000
Cost of domestic capital stock owned	0
Total deductions	786,532
Total value of all shares of stock remaining for assessment	-983,483
State assessment (not less than zero)	0
County assessments	-214,494
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	50
Domestic Tax over (under) Foreign Tax	25

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	555,951
Domestic Corporation (As If)	
Capital Stock	229,220,760
Domestic Franchise Tax	2,292,208
Domestic Shares Tax:	
Total value of all shares of stock	2,178,687,840
Deductions:	
Bobk value of real & tangible personal property	3,939,514,364
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	3,939,514,364
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	3,939,514,364
Total value of all shares of stock remaining for assessment	-1,760,826,524
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	2,292,208
Domestic Tax over (under) Foreign Tax	1,736,257

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1987
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	557,066
Domestic Corporation (As If)	
Capital Stock	217,220,760
Domestic Franchise Tax	2,172,208
Domestic Shares Tax:	
Total value of all shares of stock	2,265,314,567
Deductions:	
Book value of real & tangible personal property	4,126,104,417
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	4,126,104,417
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	4,126,104,417
Total value of all shares of stock remaining for assessment	-1,860,789,850
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	2,172,208
Domestic Tax over (under) Foreign Tax	1,615,142

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1988
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	570,472
Domestic Corporation (As If)	
Capital Stock	245,220,760
Domestic Franchise Tax	2,452,208
Domestic Shares Tax:	
Total value of all shares of stock	4,091,698,803
Deductions:	
Book value of real & tangible personal property	7,337,924,567
Book value of Alabama real & tangible personal property	
Book value of real & tangible personal property in other states	7,337,924,567
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,337,924,567
Total value of all shares of stock remaining for assessment	-3,246,225,764
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	2,452,208
Domestic Tax over (under) Foreign Tax	1,881,736

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1989
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	574,252
Domestic Corporation (As If)	
Capital Stock	184,553,960
Domestic Franchise Tax	1,845,540
Domestic Shares Tax:	
Total value of all shares of stock	3,560,970,910
Deductions:	
Book value of real & tangible personal property	7,415,969,571
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	7,415,969,571
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,415,969,571
Total value of all shares of stock remaining for assessment	-3,854,998,661
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	1,845,540
Domestic Tax over (under) Foreign Tax	1,271,288

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	573,792
Domestic Corporation (As If)	
Capital Stock	181,220,760
Domestic Franchise Tax	1,812,208
Domestic Shares Tax:	
Total value of all shares of stock	3,720,564,633
Deductions:	
Book value of real & tangible personal property	7,657,131,790
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	7,657,131,790
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,657,131,790
Total value of all shares of stock remaining for assessment	-3,936,567,157
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	1,812,208
Domestic Tax over (under) Foreign Tax	1,238,416

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1991
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	571,327
Domestic Corporation (As If)	
Capital Stock	181,220,760
Domestic Franchise Tax	1,812,208
Domestic Shares Tax:	
Total value of all shares of stock	3,907,078,548
Deductions:	
Book value of real & tangible personal property	7,806,579,156
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	7,806,579,156
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	7,806,579,156
Total value of all shares of stock remaining for assessment	-3,899,500,608
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A *Domestic Shares Tax*	0
Total Domestic Corporation Tax	1,812,208
Domestic Tax over (under) Foreign Tax	1,240,881

Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1992
CSX Transportation, Inc.	
Foreign Corporation: Franchise Tax (As Paid)	567,946
Domestic Corporation (As If)	
Capital Stock	181,220,760
Domestic Franchise Tax	1,812,208
Domestic Shares Tax:	
Total value of all shares of stock	3,493,482,716
Deductions:	
Book value of real & tangible personal property	8,001,201,780
Book value of Alabama real & tangible personal property	0
Book value of real & tangible personal property in other states	8,001,201,780
Book value of merchandise held for sale	0
Cost of domestic capital stock owned	0
Total deductions	8,001,201,780
Total value of all shares of stock remaining for assessment	-4,507,719,064
State assessment (not less than zero)	0
County assessments	0
Residue of total value of stock for assessment (not < 0)	0
N/A Domestic Shares Tax	0
Total Domestic Corporation Tax	1,812,208
Domestic Tax over (under) Foreign Tax	1,244,262

Notes to Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

BellSouth Telecommunications, Inc.; South Central Bell Telephone Company; and CSX Transportation, Inc., were assumed to be public Code of Alabama 1975, to list their shares of stock for taxation or to pay ad valorem taxes on said shares computed pursuant to Sec. 40-14-70, Code of Alabama 1975.

BellSouth Corporation

For 1986, the entire investment in affiliates was used for 'cost of capital stock owned in domestic corporations' since no detail was provided in original return.

For 1990, the total stockholders equity from the balance sheet attached to the original return was used for 'total value of all shares of stock' even though the original return reflected a $5,649,902,127 more in surplus for which the taxpayer filed a peti

refund stating the amount was overstated for dividends previously paid throughout 1990; therefore, $545 was used for franchise tax paid instead of the original amount of $17,495.06.

South Central Bell Telephone Company

BellSouth Telecommunications, Inc.; South Central Bell Telephone Company; and CSX Transportation, Inc., were assumed to be public utilities not required by Sec. 40-21-29, Code of Alabama 1975, to list their shares of stock for taxation or to pay ad valore
taxes on said shares computed pursuant to Sec. 40-14-70, Code of Alabama 1975.

BellSouth Services, Inc.

BellSouth Financial Services Corporation

For 1989 -1992, the book value of Alabama real and tangible personal property was obtained by multiplying the amount for all states by the tangible property factor from Schedule C, Line 7 of the filed return since the information provided on the attached
balance sheet was not adequate.

BellSouth Advertising & Publishing Corporation

BellSouth Resources, Inc.

Notes to Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

BellSouth Products, Inc.

Alabama Cellular Services, Inc.

Sunlink Corporation

Notes to Financial Data and Calculations used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

TechSouth, Inc.

CSX Transportation, Inc.

BellSouth Telecommunications, Inc.; South Central Bell Telephone Company; and CSX Transportation, Inc., were assumed to be public utilities not required by Sec. 40-21-29, Code of Alabama 1975, to list their shares of stock for taxation or to pay ad valorem taxes on said shares computed pursuant to Sec. 40-14-70, Code of Alabama 1975.

Tax Rates used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1986	1987
BellSouth Telecommunications, Inc.	(Q: 11-12-91)	
Domestic Franchise Tax Rate	1.000%	1.000%
Domestic Minimum Franchise Tax A	$50.00	$50.00
State Tax Rate (Alabama)	0.650%	0.650%
County Tax Rate (Jefferson)	3.560%	3.560%
Special School Tax (Birmingham)	-0.110%	-0.110%
City Tax Rate (Birmingham)	2.850%	2.850%
Domestic Shares Tax Rate	6.950%	6.950%
Assessment rate	20.000%	20.000%

	1988	1989
Domestic Franchise Tax Rate	1.000%	1.000%
Domestic Minimum Franchise Tax A	$50.00	$50.00
State Tax Rate (Alabama)	0.650%	0.650%
County Tax Rate (Jefferson)	3.560%	3.560%
Special School Tax (Birmingham)	-0.110%	-0.110%
City Tax Rate (Birmingham)	2.850%	2.850%
Domestic Shares Tax Rate	6.950%	6.950%
Assessment rate	20.000%	20.000%

Tax Rates used in "As If Domestic" Analysis prepared for counsel in anticipation of South Central Bell case.

	1990	1991
Domestic Franchise Tax Rate	1.000%	1.000%
Domestic Minimum Franchise Tax A	$50.00	$50.00
State Tax Rate (Alabama)	0.650%	0.650%
County Tax Rate (Jefferson)	3.560%	3.560%
Special School Tax (Birmingham)	-0.110%	-0.110%
City Tax Rate (Birmingham)	2.850%	2.850%
Domestic Shares Tax Rate	6.950%	6.950%
Assessment rate	20.000%	20.000%

	1992
Domestic Franchise Tax Rate	1.000%
Domestic Minimum Franchise Tax A	$50.00
State Tax Rate (Alabama)	0.650%
County Tax Rate (Jefferson)	3.560%
Special School Tax (Birmingham)	-0.110%
City Tax Rate (Birmingham)	2.850%
Domestic Shares Tax Rate	6.950%
Assessment rate	20.000%

Supreme Court, U.S.
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No. 97-2045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONERS

WALTER HELLERSTEIN
University of Georgia
Law School
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE
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SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
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v.
STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition underscores the case for certiorari. It confirms that, despite this Court's decision in *Richards v. Jefferson County*, 517 U.S. 793 (1996), Alabama will invoke its aberrant view of res judicata to bar *any* challenge to the State's foreign franchise tax; that Alabama will continue to impose and collect the tax without regard to this Court's controlling Commerce Clause decisions; and that Alabama is already gearing up to erect the next meritless roadblock to taxpayer actions seeking to enforce plainly applicable federal constitutional rights. The Brief in Opposition thus demonstrates that, unless this Court intervenes, Alabama will persist in flouting this Court's authority.

I. RESPONDENTS' THEORY OF RES JUDICATA CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS.

Respondents' Brief in Opposition expressly corroborates the startlingly broad proposition implicit in the Alabama Supreme Court's decision: under Alabama res judicata law, *any* person—even one who is "not party (or privy) to [prior] litigation"—can be bound by a judgment if a court determines that the person's "interests were represented adequately by [a] party." Br. in Opp. 6. Under respondents' approach, "adequate representation" has nothing to do with the basic components of due process. One's interests may be held "adequately represented"—and one's ability to pursue an independent claim may therefore be denied—even if one received no notice of the prior litigation, had no opportunity to be heard, and had no connection whatsoever with the case or the parties.

Asserting that this novel principle is nonetheless compatible with the Due Process Clause of the Fourteenth Amendment, respondents rely on a single sentence lifted from *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989), in which this Court said that a nonparty may sometimes be bound by the outcome of prior litigation where "its interests [were] adequately represented by someone with the same interests who is a party." *See* Br. in Opp. 6. But far from creating a general due-process exception based on "adequate representation," the Court in *Martin* expressly confined its pronouncement to "certain limited circumstances." 490 U.S. at 762 n.2. The Court noted only two instances in which the principle applies: cases involving " 'class' or 'representative' suits," and cases in which the nonparty exercised "control" over the prosecution of the prior suit. *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940), and *Montana v. United States*, 440 U.S. 147, 154-55 (1979)). This case fits neither category.

Respondents assert that "the taxpayers in *Reynolds* . . . can be said to be members of the same class as the taxpayers in this case." Br. in Opp. 7. They do not contend, of course, that *Reynolds* was a class or representative suit in any traditional sense—it plainly was not. Instead, under respondents' theory, petitioners are bound by *Reynolds* merely because their "interests with respect to the Alabama franchise tax parallel" those of the *Reynolds* plaintiffs, and because the *Reynolds* plaintiffs were "represented . . . by some of the top law firms in the State of Alabama, which rendered to them more than competent representation." *Id.* at 8.

But this Court made clear in *Richards* that binding a nonparty on the strength of nothing more than representation of *that* kind is utterly incompatible with due process. In *Richards*, a group of taxpayers sued to invalidate an unconstitutional tax that had been sustained in a prior lawsuit (the *Bedingfield* litigation) brought by other taxpayers, a city, and a city official. The Alabama Supreme Court in *Richards* had held that *Bedingfield* could be used as a res judicata bar for the same reason that respondents propose here: the taxpayer plaintiffs in the prior suit had " 'adequately represented the interests' " of the taxpayer plaintiffs in the later action. 517 U.S. at 801 (quoting the Alabama Supreme Court's opinion). This Court flatly rejected this "adequate representation" theory. It stated, in terms that apply with equal force here, that the first set of taxpayers "did not sue on behalf of a class," that "their pleadings did not purport to assert any claim against or on behalf of any nonparties," and that "the judgment they received did not purport to bind any county taxpayers who were nonparties." *Id.*[1] *Richards* thus rejected the very theory on which respondents now rely.

---

[1] *See also* 517 U.S. at 802 ("Nor is there any reason to suppose that the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be to attribute to them a power that it cannot be said that they had assumed to exercise.") (internal quotation marks omitted).

Respondents try to neutralize *Richards* by altering the facts of that case. Implying that the *Bedingfield* plaintiffs included only "Birmingham's acting finance director and the city," respondents argue that those plaintiffs simply "did not adequately represent" the taxpayer plaintiffs in *Richards* because they were not members of the same "class." Br. in Opp. 7. But even a casual reading of this Court's opinion in *Richards* shows that the *Bedingfield* plaintiffs *did* include taxpayers—indeed, taxpayers with interests " 'essentially identical' " to those of the *Richards* plaintiffs—and that the Court expressly rejected a res judicata theory based on "adequate representation" by those taxpayer plaintiffs. *See* 517 U.S. at 795, 796, 801. It is troubling that respondents would so fundamentally misstate this Court's decision in *Richards*—a case that originated in Alabama and stands on all fours with the present case.[2]

Respondents' Brief in Opposition thus brings into sharp focus why this Court should grant the petition in this case. Even though Alabama's foreign franchise tax is clearly at odds with this Court's unambiguous Commerce Clause jurisprudence, respondents continue to assess and collect the tax. Respondents' brief makes crystal clear

[2] Respondents also assert that the petition in this case involves "unique facts," Br. in Opp. 7, but they identify none. They do note that "one of the taxpayers in these cases" asked that its suit be held in abeyance pending a final decision in *Reynolds*. *Id.* at 8. But because the Alabama courts held that the remaining petitioners —who did *not* request abeyance—were equally barred, the abeyance request is inconsequential. *See* Pet. 22. In any event, abeyance requests simply have no place in the due-process equation. *See* Pet. 22-23. Nor can it possibly matter that "taxpayers filed petitions for refund with the Department [of Revenue] during the pendency of the *Reynolds* case." Br. in Opp. 8. State taxpayers routinely file refund claims to preserve their constitutional rights, and the timing of such claims often is dictated by state statutes of limitations. A taxpayer's compliance with such state-imposed refund procedures can hardly be used as a basis for invoking res judicata to strip the taxpayer of its right to pursue its federal constitutional claim in court.

that they intend to continue doing so for as long as they can get away with it. And there is no reason to doubt that Alabama courts will follow respondents' lead in saying that *Reynolds* should bar lawsuits brought by *any* "foreign corporatio[n] doing business in Alabama subject to the Alabama franchise tax." Br. in Opp. 8. Accordingly, postponing review will accomplish nothing. The Court should act now to halt Alabama's unlawful disdain of the Supremacy Clause and defiance of this Court's authority.

II. ALABAMA'S TAX PLAINLY VIOLATES THE COMMERCE CLAUSE.

Respondents' Commerce Clause arguments are equally meritless. *First*, respondents seek to remove Alabama's tax from the "virtually per se rule of invalidity" applicable to facially discriminatory taxes. Br. in Opp. 9. According to respondents, "[b]ecause the measure of the two taxes admittedly has different rates and bases, it cannot be determined from reading them whether any discrimination exists." *Id.* But this misses the essential nature of the discrimination that is apparent on the face of the statute. Alabama law permits domestic corporations to pay a tax on a base of their own choosing,[3] while compelling foreign corporations to pay tax on a base determined by their business activities in the State. *See* Pet. 4-5. A tax, whatever its rate or base, always favors those who are free to determine their own tax liability over those who

[3] Relying on the testimony of Richard G. Bacon, respondents suggest that "business reasons" may limit the ability of domestic corporations to manipulate the tax base. Br. in Opp. 12 (citing Tr. 125-162 but apparently meaning Tr. 125-126). But Mr. Bacon testified about the ability of corporations to manipulate their tax base for purposes of *Delaware* law by limiting the number of shares they have outstanding. *See* Tr. 114, 125-26. Mr. Bacon did not testify concerning corporations' ability to manipulate their tax base for purposes of Alabama law by the costless expedient of reducing the par value of their stock. *See* Pet. 4; Stipulated Facts ¶¶ 21-24 (Pet. App. 52a-53a).

are not accorded such discretion. There is therefore no escape from the conclusion of the dissenters below: "the Alabama franchise tax *facially* discriminates against interstate commerce." Pet. App. 12a (emphasis added).[4]

Second, respondents contend that the tax does not discriminate against interstate commerce because, if petitioners were domestic corporations, "their taxes in most instances would have been increased many times over." Br. in Opp. 10. But the trial court rejected this very argument: it determined, as a factual matter, that petitioners "clearly and abundantly demonstrate[d]" that the State's "franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Pet. App. 21a-22a. Respondents do not explain why they should be permitted to reargue the facts in this Court.

In any event, respondents' argument is meritless. To determine petitioners' "as if domestic" liability, the study on which respondents rely calculated the franchise tax on the basis of petitioners' existing "capital stock (par value)." Br. in Opp., App. at 2 of 7; *see id.* at 6 of 7. A substantial "as if domestic" tax figure resulted because

[4] Respondents suggest that, to the extent the tax is discriminatory, foreign corporations can avoid it "by reducing the capital they employ in Alabama" (Br. in Opp. 12)—*i.e.*, by limiting their business activities within the State. But forcing taxpayers to choose between subjecting themselves to a discriminatory tax or deploying their resources elsewhere to avoid the exaction plainly "forecloses tax-neutral decisions" (*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977)), thereby undermining our national common market. Indeed, this Court has specifically held that a victim's ability to circumvent discrimination by yielding to its illicit incentives cannot save an impermissibly discriminatory tax. *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 78 (1992) (there is "no authority for the . . . proposition . . . that a tax that . . . discriminate[s] against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business").

petitioners, not being Alabama corporations, have never had any reason to assign an artificially low par value to their stock. If petitioners had incorporated in Alabama, however, they would obviously have had every reason to minimize the par value of their stock, *see* Tr. 165, 199, 286—just as Alabama corporations typically do, *see* Pet. 4; Tr. 213-14. Respondents' study thus cannot be taken seriously: it inconsistently treats petitioners as if they *are* Alabama corporations, but not as if they *act like* Alabama corporations.

Third, respondents suggest that the discriminatory franchise tax can be saved on the theory that " 'it advances a legitimate local purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives.' " Br. in Opp. 12 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). But that assertion cannot survive even superficial analysis, much less the "strictest scrutiny" to which this Court subjects such claims. *New Energy,* 486 U.S. at 279 (internal quotation marks omitted); *see Fulton Corp. v. Faulkner,* 516 U.S. 325, 345 (1996). The purpose of *every* discriminatory tax can be "adequately served by reasonable, nondiscriminatory alternatives"—namely, a nondiscriminatory tax. *See Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 344-45 (1992). Moreover, the purposes to which respondents point—including an intent to implement a state constitutional provision and a desire to promote administrative convenience (Br. in Opp. 13)—clearly do "not constitute the kind of serious health and safety concern[s] . . . sufficient to justify discriminatory state legislation." *Kraft,* 505 U.S. at 82.[5]

Finally, respondents claim that the complementary tax doctrine has not changed substantially since the *Reynolds*

[5] Respondents' argument appears to be something of an afterthought in any event. At trial, Alabama's Franchise Tax Division Chief testified that he could think of no purpose that might be served by discriminating against foreign corporations. *See* Tr. 201-04.

case, and they assert that this petition is therefore no more certworthy than the petition in *Reynolds*. *See* Br. in Opp. 15. Petitioners have no quarrel with the observation that the essential elements of the Court's complementary tax doctrine were established at the time of *Reynolds*. Indeed, petitioners believe that, if the Alabama Supreme Court in *Reynolds* had properly interpreted this Court's complementary tax cases, it would have invalidated Alabama's foreign franchise tax long ago. But our point is a narrower one: whatever uncertainty may have existed at the time of *Reynolds* about the defensibility of Alabama's discriminatory tax scheme under the complementary tax doctrine, there can be no such doubt now in light of this Court's subsequent decisions in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994); and *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994).[6]

At any rate, respondents present no serious defense of Alabama's franchise tax under the complementary tax doctrine. With respect to the requirement that a tax on interstate commerce "must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce," *Oregon Waste*, 511 U.S. at 103, respondents rest simply on their meritless claim that the tax does not discriminate at all, *see* Br. in Opp. 15. And respondents make no effort to explain how the domestic shares tax can satisfy the "substantially equivalent events" test beyond suggesting that the shares tax is "based on the same measure" as the foreign franchise tax. *Id.* at 16. Nor do respondents offer any response to petitioners' arguments that the domestic shares and foreign franchise taxes

[6] Besides, there are many other reasons that may explain why this Court denied review in *Reynolds*. For example, the Court may have determined that the evidentiary failure found by the Alabama Supreme Court (*see* Pet. 7)—a failure fully rectified in the present case—made *Reynolds* a poor vehicle for addressing the legal issues presented.

are imposed on different events and different taxpayers, and that the domestic shares tax is already "complemented" by the foreign shares tax. *See* Pet. 27-28 & n.15.

III. RESPONDENTS' "PURE PROSPECTIVITY" ARGUMENT IS MERITLESS.

Respondents finally argue that, if this Court rejects the State's res judicata theory and invalidates the foreign franchise tax, it should remand to the Alabama Supreme Court for determination of a remedy. Br. in Opp. 16. At the same time, however, respondents signal their intention, on any such remand, to throw yet another obstacle in petitioners' path: they will argue that a decision in this case invalidating Alabama's foreign franchise tax should be applied purely prospectively, so that not even petitioners themselves would be accorded the benefit of such a decision. *See id.*

Even assuming that there might still be cases in which a decision announcing a rule of federal law may properly be given only prospective effect, this could not possibly be such a case. If either this Court or an Alabama court were to invalidate the State's foreign franchise tax, it would do so because of rules of federal law announced by this Court in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), and other cases that rejected a *de minimis* defense and that narrowly restated the complementary tax doctrine. Because this Court applied those rules to the parties before it in those cases, the Alabama courts on remand may not withhold the benefit of those rules from petitioners. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) ("this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision").[7]

[7] Not even respondents take issue with the proposition that petitioners will be entitled, in that event, to refunds in accordance with Alabama's established refund procedures. *See* Pet. 29. This Court's decisions leave no room for any other result. *See Newsweek, Inc.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER HELLERSTEIN
University of Georgia
Law School
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

July 27, 1998

* Counsel of Record

---

v. Florida Dep't of Revenue, 118 S. Ct. 904 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

(13)

No. 97-2045

Supreme Court, U.S.
FILED
NOV 13 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

JOINT APPENDIX

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495
Counsel for Petitioners

* Counsel of Record

BILL PRYOR
Attorney General
RON BOWDEN
Assistant Attorney General
DAN E. SCHMAELING
Assistant Attorney General
STATE OF ALABAMA
P.O. Box 320001
Montgomery, Alabama 36132
(334) 242-9690

CHARLES J. COOPER *
COOPER, CARVIN &
ROSENTHAL, P.L.L.C.
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8960
Counsel for Respondents

(Additional counsel listed on inside cover)

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 18, 1998
CERTIORARI GRANTED SEPTEMBER 29, 1998

183 pp

WALTER HELLERSTEIN
University of Georgia
Law School
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800
Counsel for Petitioners

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IN THE SUPREME COURT OF ALABAMA

Case Number 1960591

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE

Montgomery County Cir. Ct. No.: CV-89-2600, 90-1591, 90-1711, 91-397, 91-1079, 90-2555, 90-2556, 90-2557, 90-2558, 91-2151

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
010297	Motion of aplt for transfer of joint appeal challenging Alabama Franchise Tax Scheme from the Alabama Court of Civil Appeals to the Supreme Court of Alabama pursuant to Code of Alabama 1975, Section 12-3-15.
011497	Appellants' motion to transfer joint appeal to the Supreme Court of Alabama is granted.
011497	Filed with Clerk of the Supreme Court.
011597	Docketed by RBN/JCD. $100 Docket fee rec'd in Court of Civil Appeals. In forma pauperis?N
010297	Notice of appeal filed in trial court.
010397	Docketing statement filed.
012197	Docketing statement filed.
013097	Clerk's record completed; certificate filed 020397

DATE	PROCEEDINGS
022697	Record on appeal completed; certificate filed 022797
040997	Aplt. brf.filed (10) copy(s) m (Byars, Hellerstein)
040997	Appendix to Aplt. brf.filed (10) copy(s) m (Byars, Hellerstein)
040997	[Oral argument] Requested by Aplt.
042597	Aple. brf.filed (10) copy(s) m (Pryor, Bowden, Schmaeling)
052097	Aplt. reply brf.filed (10) copy(s) m
053097	Record on appeal filed w/Sup.Ct. - Tot.vols. 14
061997	[Oral argument] Denied
061997	Submitted on brfs.in lieu of oral argument.
032098	Judgment AFFIRMED - NO OPINION
032098	No Opinion, pursuant to Rule 53, ARAP, by PER CURIAM Concurrences: Hooper, CJ., Almon, Shores and Houston, JJ., concur; Maddox, J., concurs specially; Kennedy, Cook, Butts and See, JJ., dissent. (17pp.)
040798	Certificate of Judgment Issued

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CASE: CV 89-2600
(and consolidated cases CV 90-1591,
CV 90-1711, CV 91-397 & CV 91-1079)

SOUTH CENTRAL BELL TELEPHONE CO., *et al.*

v.

STATE DEPARTMENT OF REVENUE

CASE: CV 90-2555
(and consolidated cases CV 90-2556,
CV 90-2557, CV 90-2558, CV 91-2151)

CSX TRANSPORTATION, INC.

v.

STATE DEPARTMENT OF REVENUE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	CASE: CV 89-2600
1/12/90	Complaint fld. Atty stated deft will accept service
1/23/90	Order placing case on admin docket.
10/30/90	Answer fld by Deft
11/9/90	Defts Mot to Consolidate CV-89-2600 w/CV-89-2252; CV-89-2253; CV-89-2254; CV-89-2475; CV-89-2511; CV-89-2510; CV-89-2586; CV-89-2600; CV-89-2601; CV-89-2602; CV-90-846; CV-90-856; CV-90-858; CV-90-859; CV-90-860; CV-90-911; CV-90-914; CV-90-915; CV-90-916; CV-90-917;

DATE	PROCEEDINGS
	CV-90-917; CV-90-912; CV-90-957; CV-90-958; CV-90-959; CV-90-960; CV-90-961; CV-90-962; CV-90-982; CV-90-1590 & CV-90-1711 fld.
11/16/90	Pltfs Mot to Consolidate CV-89-2600 w/CV-90-1591 & CV-90-1711 fld.
V	Pltfs Opposition to Consolidation fld.
2/19/91	Amend. to Complaint & Petition for Judicial review, Pursuant to 41-22-20, Code of Al 1975
3/25/91	Defts Amended Answer fld.
6/5/91	Defts Mot for Order Consolidating Cases fld w/ CV-91-1079; CV-90-1591; CV-90-1711 and CV-89-2600 fld.
6/24/91	Pltfs Amended Mot. for Order Consolidating Cases fld.
V	Consolidated Discovery—Interrog's, Req. for Prod. & Req. for Admissions by Taxpayers fld.
7/8/91	Order *granting* consolidation of CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397-G and CV-91-1079-TH fld.
7/29/91	Deft. Response To Request for Admissions
8/22/91	Brief In Support of MSJ & Mot. for Partial Summary Judg fld.
8/22/91	Deft. Answer To Interrogatories
8/22/91	Deft. Motion For Summary Judgment
6/24/92	Ordered that this case is removed from administrative docket of this court and restored to the active docket.
2/1/93	Taxpayers' BellSouth Telecommunications, Inc. et al Response To Motion For Summary Judgment.
2/1/95	Taxpayers BellSouth Telecommunications, Inc., South Central Bell Telephone Co., BellSouth Corp., BellSouth Services Inc., BellSouth Financial Services Corp., BellSouth Advertising & Publishing Corp. BellSouth Resources Inc. BellSouth Products, Inc. Ala. Cellular Services Inc., Sunlink Corp & TechSouth Inc. (Bell Companies and CSX Trans Response to MSJ.

DATE	PROCEEDINGS
2/4/93	Amendment to Taxpayers' Response to MSJ
2/16/93	Taxpayer CSX Transp. Stipulated Facts
7/15/93	Deft Supplemental Brief In Support of Motion For Summary Judgment and Motion For Partial Summary Judgment
7/15/93	Amendment to Motion for Summary Judgment Deft. fld.
7/30/93	Deft. Dept. of Revenue Second Amended Answer
7/30/93	St. of AL Dept of Revenue Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ and Motion For Partial Summary Judgment.
8/6/93	Taxpayers BellSouth Telecommunications Inc., South Central Bell Telephone Co., BellSouth Corp., BellSouth Services, Inc., BellSouth Fniancial Service Corp., BellSouth Advertising & Publishing Corp., BellSouth Resources, Inc., BellSouth Products, Inc., Ala. Cellular Services, Inc., Sunlink Corp and TechSouth Inc. (Bell Companies) and CSX Transportation Inc. Response to Amendments to Motion For Summary Judgment and Supplemental Briefs.
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20 Code of Alabama 1975.
10/1/93	Ordered These cases are placed on the administrative docket of this Court: Trial set on 8/1/94.
10/15/93	Answer to Second Amendment to Complaint fld.

DATE	PROCEEDINGS
5/17/94	Motion to w/d & substitute stipulated facts by Joint Amendment to Taxpayer Resp. to amendments to Motion for Sum. Jdgt with conditional affidavit of Richards & a Study; Stipulated Facts fld by Taxpayer.
5/17/94	Brief of pltff, taxpayer fld
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post-Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res judicata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, CIrcuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD FILED W/$100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERK'S RECORD MAILED TO SUPREME COURT & ATTYS.

DATE	PROCEEDINGS
	CASE: CV 90-1591
8/13/90	Complaint fld.
8/28/90	Pltf. Amendment To Complaint For Declaratory Judgment and Refund of Taxes Paid Under Protest.
9/19/90	Defts. Answer fld
11/9/90	Defts Mot. to Consolidate CV-90-1591 w/CV-89-2252; 2253; 2254; 2475; 2511; 2510; 2586; 2600; 2601; 2602; CV-90-846; 856; 858; 859; 860; 911; 914; 915; 916; 917; 912; 957; 958; 959; 960; 961; 962; 982 & 1711 fld.
11/16/90	Pltfs Opposition to Consolidation fld.
√	Pltfs Mot. for Order Consolidating Cases CV-89-2600; CV-90-1591 & CV-90-1711 fld
11/28/90	Order consolidating CV-90-1591 w/CV-89-2600 & CV-90-1711 fld. & sched. conf. set for 12/14/90 at 8:30 a.m.
1/4/91	Defts Mot. to Amend Mot. to Consolidate fld.
2/19/91	Amend. to Complaint for Declaratory Judg. & refund of Taxes Paid Under Protest fld
3/25/91	Defts Amended Answer fld.
6/5/91	Pltfs Mot. for Order Consolidating Cases w/CV-89-2600; CV-91-1079; CV-90-1591 and CV-90-1711 fld.
6/24/91	Pltfs Amended Mot. for Order Consolidating Cases fld.
√	Consolidated Discovery—Interrog's, Requests for Prod. & Requests for Admissions by taxpayers fld.
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-C; CV-91-397-G and CV-91-1079-TH.
10/17/91	Order transferring case from administrative docket to the regular docket

DATE	PROCEEDINGS
6/24/92	Ordered that this Case is removed from the Administrative docket of this Court and restored to the active docket.
1/13/93	Petitioners, BellSouth Corp, BellSouth Services Inc., BellSouth Financial Servcies Corp, BellSouth Adv. & Publ. Co., BellSouth Resources Inc., Ala. Cellular Services Inc., Sunlink Inc & TechSouth Inc. Third Amendment to Complaint for Declaratory Judgment and Refund of Taxes Paid under Protest.
1/28/93	Defts. Answer to Third Amendment to Complaint
2/1/93	Taxpayers, BellSouth Telecommunications Inc., South Central Bell Telephone Co. BellSouth Corp., BellSouth Services Inc., BellSouth Financial Services Corp., BellSouth Advertising & Publishing Corp., BellSouth Resources, Inc. BellSouth Products, Inc. AL Cellular Services, Sunlink Corp. & Tecsouth Inc. (Bell Companies and CSX Transportation Inc. Response to Motion For Summary Judgment.
2/4/93	Amendment To Taxpayers' Response To MSJ
2/16/93	Taxpayers CSX Trans. Stipulated Facts.
7/30/93	Deft. Dept. of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ & Motion For Partial Summary Judgment.
8/6/93	Taxpayers' Response To Amendment To Motion For Summary Judgment and Supplemental Briefs.
9/20/93	Pltf. Fourth Amendment to Complaint For Declaratory Judgment And Refund of Taxes Paid Under Protest

DATE	PROCEEDINGS
10/1/93	Ordered these cases are placed on the administrative docket of this Court; Trial on these consolidated cases set on 8/1/94
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post-Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refunds. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE AND ORDERED this 3rd day of December, 1996 /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 90-2555

12/13/90	Complaint fld.
12/13/90	Cost & supersedeas bond filed & approved.

DATE	PROCEEDINGS
1/8/91	CSX Transportation, Inc. Motion For Order Consolidating Cases
1/11/90	ORDERED, plaintiff's motion to consolidate cases no. CV-90-2556-M, CV-90-2557-PH and CV-90-2558 with the above styled case is granted. It is further ORDERED that a scheduling conference is set in these case numbers *by conference call* on February 8, 1991 at 8:30 a.m. DONE and ORDERED in chambers this 11th day of January, 1991. /s/ William Gordon, Circuit Judge.
1/14/91	Answer fld by deft.
6/24/91	Pltf. Consolidated Discovery—Interrogatories, Request For Production And Requests For Admissions By Taxpayer, Taxpayer's First set of Interrogatories, Request For Production And Requests For admissions To Commissioner and Dept.
7/29/91	Deft. Response To Request For Admissions
1/13/93	Petitioner CSX Transp., Amendment to Complaint and Petition for Judicial Review Pursuant to S41-22-20, Code of Alabama 1975
1/28/93	Respondents/Appellees Answer To Amendment To Complaint.
2/1/93	Taxpayers et al Response to Motion for Summary Judgment.
2/4/93	Amendment to Taxpayers' Response to Motion Summary Judgment.
2/16/93	Taxpayer CSX Transp. Stipulated Facts.
7/30/93	Deft Dept of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment

DATE	PROCEEDINGS
8/6/93	Taxpayer's Response to Amendments to Motion for Summary Judgment & Supplemental Briefs.
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20 Code of Ala. 1975, fld.
10/1/93	Ordered that these cases are placed on the Administrative docket of this Court; Trial set 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld.
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld
12/3/96	ORDER—Consistent with the Court's opinion would hold that the relief to be afforded the Taxpayer's in this case is prospective only, and the Court of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection under the Fourteenth Amndment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed to the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

DATE	PROCEEDINGS
	CASE: CV 90-2556
12/13/90	Complaint fld.
12/13/90	Cost Bond, Supersedeas bond fld & approved.
1/8/91	CSX Transportation, Inc. Motion for Order Consolidating Cases
1/11/91	Deft. Answer Fld.
6/24/91	Consolidated Discovery, Interrogatories, Requests for Production and Requests for Admissions by Taxpayers; Taxpayer's First Set of Interrogatories, Request for Production and Requests for Admissions to Commissioner and Dept.
11/27/91	CSX Transportation Inc. Motion for Order Consolidating Cases w/CV-91-2151-G, 90-2555-G, 90-2557-G and 90-2558-G.
1/13/93	Petitioner CSX Transp. Inc. Amendment to Complaint and Petition for Judicial Review Pursuant to S 41-22-20, Code of Alabama 1975.
1/28/93	Stan McDonald & Dept of Revenue Answer to Amendment to Complaint.
2/1/93	*Taxpayer* et al Response to MSJ
2/4/93	Amendment to *Taxpayers'* Response to Motion for Summary Judgment.
2/16/93	Taxpayers CSX Transp. Stipulated Facts
7/30/93	Deft. Dept. of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to Motion for Summary Judgment
7/30/93	" " " " Second Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment.
8/6/93	Taxpayers' Response to Amendments to Motion for Summary Judgment & Supplemental Brief. Denied 8/25/93

DATE	PROCEEDINGS
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20, Code of Alabama 1975 fld.
10/1/93	Ordered that these cases are placed on the Administrative docket of this Court; Trial set on 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld.
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

DATE	PROCEEDINGS
	CASE: CV 90-2557
12/13/90	Complaint fld.
1/8/90	CSX Transportation, Inc. Motion for Order Consolidating Cases
1/14/91	Answer fld by defts
11/27/91	CSX Transportation Inc. Motion for Order Consolidating Cases w/CV-90-2151-G, CV-90-2555-G, CV90-2556 and 90-2558—(Granted 11/27/91)
1/13/93	Petitioner CSX Trans. Inc. Second Amendment to Complaint and Petition for Judicial Review Pursuant to S 41-22-20, Code of Alabama 1975, and or Petition for Writ of Mandamus
1/28/93	Stan McDonald and Dept. of Rev. Answer to Second Amendment to Complaint.
2/1/93	Taxpayers et al Response to MSJ.
2/4/93	Amendment to Taxpayers' Response to MSJ
2/16/93	Taxpayers CSX Transp. Stipulated Facts.
7/30/93	Deft. Dept of Revenue Second Amended Answer.
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief in Support of MSJ & Motion for Partial Summary Judgment.
8/6/93	Taxpayers' Response to Amendments to Motion for Summary Judgment and Supplemental Briefs. Denied 8/25/93
9/20/93	Third Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20 Code of Ala 1975 &/or Petition for Writ of Mandamus.
10/1/94	Ordered that these are placed on the administration docket of this Court; 8/1/94
10/15/93	Answer to Third Amendment to Complaint fld.

DATE	PROCEEDINGS
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld
12/3/96	Order—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS
	CASE: CV 90-2558
12/13/90	Complaint fld.
1/8/91	CSX Transportation, Inc. Motion for Order Consolidating Cases

DATE	PROCEEDINGS
1/10/91	Defts. Answer
11/27/91	CSX Transportation Motion for Order Consolidating Cases with CV-91-2151-G, CV-90-2555-G, CV-90-2556, 90-2557-G (Granted 11/27/91)
1/13/93	Petitioner CSX Transp. Inc. Second Amendment to Complaint and Petition for Judicial Review Pursuant to S41-22-20, Code of Alabama 1975, and or Petition for Writ of Mandamus
1/28/93	Respondent/appellees answers to second amendment to Complaint.
2/1/93	Taxpayers et al Response to MSJ.
2/4/93	Amendment to Taxpayers' Response to Motion for Summary Judg.
2/16/93	Taxpayers CSX Transp. Stipulated Facts.
8/6/93	Taxpayers' Response to Amendment to Motion for Summary Judgment and Supplemental Briefs.
9/20/93	Third Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20, Code of Ala 1975 and/or Petition for Writ of Mandamus.
10/1/93	Ordered that these cases are placed on the administrative docket of this Court; Trial set 8/1/94
10/15/93	Answer to Third Amendment to Complaint fld
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a tax refund.

DATE	PROCEEDINGS
	Because the Court has held this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 90-1711

9/21/90	Complaint filed with acceptance of service fld by A. G. & dept of revenue
11/1/90	St. of Al deft. Answer fld.
11/9/90	Defts Mot. to consolidate CV-90-1711 w/CV-89-2252; 2253; 2254; 2475; 2511; 2510; 2586; 2600; 2601; 2602; CV-90-846; 856; 858; 859; 860; 911; 914; 915; 916; 917; 912; 957; 958; 959; 960; 961; 962; 982 & 1591 fld.
11/16/90	Pltfs opposition to consolidation fld.
√	" Mot for Order Consolidating Cases CV-89-2600 w/CV-90-1591 & CV-90-1711
11/28/90	Order consolidating CV-89-2600 w/CV-90-1591 & CV-90-1711 fld.
2/19/91	Amend. to Complaint & Petition for Judicial Review pursuant to etc.

DATE	PROCEEDINGS
3/25/91	Deft Amended answer fld.
6/5/91	Defts Mot. for Order Consolidating Cases CV-89-2600; CV-90-1591; CV-90-1711 and CV-91-1079 fld
6/24/91	Pltfs Amended Mot. for Order consolidating cases fld.
√	Consolidated Discovery—Interrog's Reg. for Prod. & Reg. for Admissions by taxpayers fld.
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397 and CV-91-1079 fld.
2/16/93	Taxpayers CSX Transportation stipulated facts.
7/30/93	Deft. Dept of Revenue Second Amended answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ & Motion for Partial Summary Judgment
8/6/93	Taxpay's Response to amendment to Motion for Summary Judgment and Supplemental Brief Denied 8/25/93
9/20/93	Second Amendment to Complaint & Petition for Judicial Review pursuant to 41-22-20 Code of Alabama 1975.
10/1/93	Ordered that these cases are placed on administrative docket of; Trial on these consolidated cases is set for trial 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Post Trial Supplemental Brief of Pltfs/Taxpayers fld. by Pltfs.
12/3/96	ORDER—Consistent with the Court's Opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this

DATE	PROCEEDINGS
	case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other that ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD FILED W/$100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 91-397

2/15/91	Complaint fld.
3/25/91	Defts. Answer fld.
4/17/91	Deft. James M. Sizemore Jr. & Dept of Revenue answer
6/24/91	Taxpayers Consolidated Discovery—Interrog's, Reg. for Prod. & Reg's for admissions by taxpayers fld. Pltfs Amended Mot. for Order Consolidating Cases fld.

DATE	PROCEEDINGS
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397-G and CV-91-1079-TH fld.
5/28/92	Order consolidating cases CV-90-2555; CV-90-2556; CV-90-2557; CV-90-2558; CV-91-2151
1/13/93	Petitioner S. C. Bell Tele. Co. Amendment to Complaint and Petition for Judicial Review Pursuant to S 41-22-20, Code of Alabama 1975, and/or Petition for Writ of Mandamus.
1/28/93	Stan McDonald and Dept of Rev. Answer to Amendment to Complaint.
2/1/93	Taxpayers et al. Response to Motion for Summary Judgment.
2/4/93	Amendment to Taxpayers' Response to MSJ
7/30/93	Deft. Dept of Revenue Second Amended Answer
7/30/93	" " " " Second Amendment to MSJ
7/30/93	" " " " Second Supplemental Brief In Support of MSJ & Motion for Partial Summary Judgment.
8/6/93	Taxpayers' Response to Amendment to Motion for Summary Judgment and Supplemental Brief. Denied 8/25/93
9/20/93	Second Amendment to Complaint & Petition for Judicial Review Pursuant to 41-22-20, Code of Alabama, 1975 and/or Petition for Writ of Mandamus.
10/1/93	Ordered that these cases are placed on administrative docket; Trial set 8/1/94
10/15/93	Answer to Second Amendment to Complaint fld.
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment fld.
12/19/94	Pltfs Post Trial Supplemental Brief of Pltfs/Taxpayers fld.

DATE	PROCEEDINGS
12/3/96	ORDER—Consistent with the Court's opinion in the Reynolds litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD FILED W/100
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

CASE: CV 91-1079

5/10/91	Complaint fld.
6/5/91	Defts Mot. for Order Consolidating Cases CV-89-2600; CV-90-1591 and CV-90-1711 fld.
6/7/91	Answer fld by defts.
6/24/91	Pltfs Amended Mot. for Order Consolidating Cases fld.
V	Consolidated Discovery—Interrog's, Reg's for Prod. & Reg's for admission by Taxpayers fld.

DATE	PROCEEDINGS
7/8/91	Order consolidating CV-89-2600-G; CV-90-1591-G; CV-90-1711-G; CV-91-397 w/CV-91-1079-TH
2/1/93	Taxpayer et al Response to Motion for Summary Judgment.
2/4/93	Amendment to Taxpayer's Response to MSJ
7/30/93	Deft of Revenue of Second Amended Answer
7/30/93	Deft of " " Second Amended to MSJ
7/30/93	Deft " " " Second Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment.
8/6/93	Taxpayers Response to Amendments to Motion for Summary Judgment and Supplemental Briefs Denied 8/25/93
9/20/93	Amendment to Complaint for Declaratory Judgment and Refund of Taxes paid under protest fld.
10/1/94	Ordered that these cases are placed on administrative docket of this court; Trial 8/1/94
5/25/94	Third Supplemental Brief in Support of MSJ and Motion for Partial Summary Judgment
12/19/94	Post-Trial Supplemental Brief of Pltfs/Taxpayers fld.
12/3/96	ORDER—Consistent with the Court's opinion in the REYNOLDS litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund. Because the Court has held that this action is barred by res juricata and the application of that doctrine does not violate the Taxpayer's equal protection rights under the Fourteenth Amendment

DATE	PROCEEDINGS
	of the United States Constitution, it is ORDERED that the Taxpayer's claims are dismissed, and the costs of this action are taxed against the Taxpayers. DONE and ORDERED this 3rd day of December, 1996. /s/ William Gordon, Circuit Judge.
1/2/97	NOTICE OF APPEAL, SECURITY FOR COSTS, DESIGNATION OF RECORD W/100 DOCKET FEE
1/30/97	CERTIFICATE OF COMPLETION OF CLERKS RECORD MAILED TO SUPREME COURT & ATTYS.

[Filed Jan. 23, 1990]

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

Case No. CV-89-2600-G

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Plaintiff,

v.

STATE OF ALABAMA, DEPARTMENT OF REVENUE,
Defendant.

ORDER PLACING CASE ON ADMINISTRATIVE DOCKET

Pursuant to the letter request of the parties, it is ORDERED that this case is placed on the administrative docket of the Court.

DONE and ORDERED in chambers this 23rd day of January, 1990.

/s/ William Gordon
WILLIAM GORDON
Circuit Judge

[Filed Feb. 8, 1991]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2252-M

MOBIL OIL CORPORATION, INC.,

CV-89-2253-TH

MOBIL OIL EXPLORATION AND
PRODUCING SOUTHEAST, INC.,

CV-89-2254-PR

MOBIL OIL EXPLORATION AND
PRODUCING NORTH AMERICA, INC.,

CV-89-2475-TH

WEST POINT PEPPERELL, INC.,

CV-89-2511-TH

THE PITTSBURGH AND MIDWAY COAL
MINING COMPANY, INC.,

CV-89-2510-PR

CHEVRON USA, INC.,

CV-89-2586-PR

DOUGLAS OIL COMPANY, INC.,

CV-89-2600-G

SOUTH CENTRAL BELL TELEPHONE COMPANY, INC.,

CV-89-2601-M

CHAMPION REALTY COMPANY, INC.,

CV-89-2602-PH

CHAMPION INTERNATIONAL CORPORATION, INC.,

CV-90-846-PR

MOBIL OIL CORPORATION, INC.,

CV-90-856-TH

NELSON BROTHERS, INC.,

CV-90-858-PH

RYDER INTERNATIONAL, INC.,

CV-90-859-PR

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC.,

CV-90-860-TH

MOBIL OIL EXPLORATION AND PRODUCING NORTH AMERICAN, INC.,

CV-90-911-PR

CHEVRON USA, INC.,

CV-90-914-M

FORD MOTOR CREDIT COMPANY, INC.,

CV-90-915-PH

FORD MOTOR COMPANY, INC.,

CV-90-916-PR

FORD NEW HOLLAND, INC.,

CV-90-917-TH

FORD LEASING DEVELOPMENT, INC.,

CV-90-912-TH

CHEVRON CHEMICAL CORPORATION, INC.,

CV-90-957-PH

SHELL OIL CORPORATION, INC.,

CV-90-958-PR

SHELL WESTERN E & P, INC.,

CV-90-959M

SHELL OFFSHORE, INC.,

CV-90-960-PH

CARGILL, INC.,

CV-90-961-PR

HOHENBERG BROTHERS, INC.,

CV-90-962-TH

GEORGIA PACIFIC CORPORATION, INC.,

CV-90-982-PH

BOISE-CASCADE CORP., INC.,

CV-90-1591-G

BELL-SOUTH INC., et al.,

CV-90-1711-P

SOUTH CENTRAL BELL TELEPHONE COMPANY, INC.,

CV-90-2556-M

CSX TRANSPORTATION, INC.,

CV-90-2555-G

CSX TRANSPORTATION, INC.,

CV-90-2557-PH

CSX TRANSPORTATION, INC.,

CV-90-2558-PR

CSX TRANSPORTATION, INC.,

CV-90-2308-PH

FORD EQUIPMENT LEASING COMPANY
Plaintiffs,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE,
Defendant.

MOTION TO AMEND STATE'S MOTION TO CONSOLIDATE AND MOTION TO STAY

The State of Alabama moves this Honorable Court to amend its previous Motion to Consolidate, and further moves for a Stay of all cases pending in this Court. As grounds for said Motion, the State would show unto the Court the following:

1. *Douglas Oil Company, Inc.*, CV-89-2586-PR, should be deleted from the State's consolidation request. This case was included in error, and has been disposed of by Summary Judgment granted August 7, 1990.

2. The South Central Bell and companion cases, CV-89-2600-G, CV-90-1591-G, CV-90-1711-P have previously been consolidated by Order of the Court before the Honorable Judge William Gordon.

3. The CSX cases, CV-90-2556-M, CV-90-2555-G, CV-90-2557-PH, and CV-90-2558-PR have previously been consolidated by Order of the Court before the Honorable Judge William Gordon.

4. The issues for resolution in all of these cases involve identical legal issues as the cases presently pending before Judge Gordon.

5. All of the Plaintiff corporations are represented by the same counsel.

6. The attorneys for the State and for all of the cases hereinabove, including the consolidated cases pending before Judge Gordon, have agreed upon shared joint discovery in the interest of judicial economy and to avoid unnecessary costs or delay.

7. The attorneys for the State and for all of the cases listed hereinabove have agreed to be bound by the final ruling rendered in the consolidated CSX and South Central Bell cases currently pending before Judge Gordon.

WHEREFORE, the State respectfully requests that this Honorable Court enter an Order deleting Douglas Oil Company, Inc., CV-89-2586-PR, from consolidation, deleting the CSX cases and South Central Bell and companion cases which are already consolidated before the Honorable Judge William Gordon, and granting the consolidation of the remainder of the cases listed hereinabove. The State further requests that this Honorable Court will enter an Order granting a Stay of all the cases pending before this Court until resolution of the "CSX" and South Central Bell and companion cases previously consolidated and currently pending before the Honorable Judge William Gordon.

/s/ Nancy I. Cottle
NANCY I. COTTLE
Assistant Counsel
Department of Revenue and Assistant
Attorney General, State of Alabama
P.O. Box 320001
Montgomery, AL 36132-0001
Telephone: 242-9690

Attorney for State of Alabama
Department of Revenue

[Filed Aug. 22, 1991]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2600-G
and Consolidated Cases

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Plaintiff,

vs.

STATE OF ALABAMA, DEPARTMENT OF REVENUE,
Defendant.

ANSWER TO INTERROGATORIES

Pursuant to Rule 33, Alabama Rules of Civil Procedure, the State of Alabama Department of Revenue answers the Interrogatories propounded to it by the BellSouth companies as follows:

1. Ernest Broadhead, Chief, Franchise Tax Division, Alabama Department of Revenue, 50 Ripley Street, Montgomery, Alabama 36104, (205) 242-9800.

2. I have no knowledge of the exact components utilized by the Department to compute "capital employed in this State" for the years prior to 1961.

A. Apparently, on September 8, 1961, upon the passage of Act No. 912, this component was first delineated specifically by statute.

B. Same as A.

C. Same as A.

D. Same as A.

3. Yes.

4. I do not know whether paid-up capital stock was ever included in the tax base.

A. See 4 above.

B. Yes.

C. No.

D. No.

E. The statute requires that the tax on domestic corporations be based on their capital stock.

F. The statute does not refer to actual book values.

5. No.

6. A. Yes.

B. The total capital is increased if the increase in indebtedness is long term or involves debt to a parent or subsidiary which is not also required to pay a franchise tax to Alabama.

C. Yes.

7. Capital stock.

8. Capital employed in Alabama, less certain deductions.

9. Total value of the shares, less deductions.

10. I don't know the legislative purpose for the franchise tax.

A. No.

B. I do not know.

C. I do not know.

D. I do not know.

E. I do not know.

11. County tax collectors are so authorized; however, the shares tax in fact is virtually always paid by the corporation.

12. Yes.

13. I do not know.

14. The Department objects to this question on the grounds that this information is confidential and is contained only on the returns of the taxpayers. The share tax information is not contained on the returns and it is not available. See answer to Question 1 of Request for Production.

15. See the answer to 14.

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Personally appeared before the undersigned authority in and for said County and State Ernest J. Broadhead, who after being first duly sworn, depose on oath and say that the foregoing answers are true and correct to his best knowledge, information and belief.

/s/ Ernest J. Broadhead
Affiant

[Notary Omitted]

[Filed Oct. 17, 1991]

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

Case No. CV-89-2600-G

SOUTH CENTRAL BELL,
Plaintiff,

v.

REVENUE DEPARTMENT,
Defendant.

ORDER

It is ORDERED that the above-styled case is transferred from the administrative docket to the regular docket.

DONE and ORDERED this 17th day of October, 1991.

/s/ William Gordon
WILLIAM GORDON
Circuit Judge

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

Case No. CV-89-2600
(with consolidation of
CV-90-1591, CV-90-1711,
CV-91-397 & CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs,

vs.

STATE REVENUE DEPARTMENT,
Defendant.

Case No. CV-90-2555
(with consolidation of CV-90-2556,
CV-90-2557, CV-90-2558, CV-91-2151)

CSX TRANSPORTATION, INC,
Plaintiff,

vs.

STATE REVENUE DEPARTMENT,
Defendant.

Consolidated as CV-89-2600-G

DEPOSITION OF ERNEST J. BROADHEAD

* * * *

[53] Q. Insofar as the domestic corporation is concerned, can it not freely under the corporate laws of this

state reduce its tax liability by changing the par value of its stock at any time?

[54] A. Yes.

Q. Okay. So if it had been incorporated for this hundred thousand dollar fictional, and that had been the par value initially, but it got a good CPA or lawyer who advised it to let's have a corporate amendment and amend the charter to a thousand dollar par value, you would reduce the domestic franchise tax substantially.

A. Yes.

Q. And so I'll use it, for no better term, you can manipulate the amount of domestic shares tax paid in Alabama by manipulating the par value of the stock?

A. Yes.

Q. Okay. Let's go to the foreigns. We had started there. And other than some financial institutions which do not pay shares tax or franchise tax to the State of Alabama, a foreign corporation, for franchise tax purposes, is defined as a corporation organized under the laws of some unit, state, government, other than the [55] State of Alabama.

A. Yes.

Q. That's a foreign.

And as foreign corporations, they are required to pay a mandated foreign franchise tax based—as a foreign corporation, based on Section 40-14-41?

A. Yes.

Q. And there is nothing—as long as they remain a foreign corporation, there is no way that they can avoid the tax under Section 41?

A. As long as they remain qualified to do business in Alabama.

Q. Right.

A. That's correct.

Q. There is no way they can—Strike that.

Under the constitution of Alabama, insofar as foreign corporations are concerned, is there a constitutionally mandated franchise tax on foreign corporations?

A. Yes.

[56] Q. And is that Section 232 in the constitution?

A. Yes.

Q. And what is the exact language, if you will, if you recall, of the tax base imposed by the constitution which mandates the tax on foreign corporations?

A. Capital employed in this state.

Q. Okay. And that's the actual amount of capital employed in this state, correct?

A. Yes.

Q. So it's the real value?

A. Yes.

Q. It's not a fictional value?

A. Yes.

Q. It's an up-to-date value, a market value; is that not correct?

A. As of tax date.

* * * *

[69] Q. We go back to your 1983 study. I think that's it sitting right over there, which is the one that's introduced, I think, there, which is Taxpayer's Exhibit One and also 1-A, which is the calculations for that spread sheet. And ask you that in your calculations here and in your study, did it relate primarily to the differences between the domestic franchise tax levied and the [70] foreign franchise tax levied pursuant to their respective statutes.

A. Yes.

Q. In that study did you compute the as-if foreign tax for the domestic corporations? In other words, take the domestic corporation and say, all right, here is your tax as a domestic, but now I am going to assume that you are a foreign, and I am going to take the foreign tax base, as set forth in Section 41, and the foreign tax rate, as set forth in Section 41, and calculate your tax as if you were a foreign corporation.

[71] A. Yes.

Q. All right. And what did that study show, if you recall? And do you need anything to reference?

A. It showed the amount of tax that would have been paid by the domestic corporations if they were, in fact, filing as foreign corporations.

Q. Do you remember the figures? Wasn't it [72] substantially greater for the same corporations taxed as if foreign rather than as domestics?

A. Yes.

Q. All right. And I believe you said at that time eight to one, is that correct, that—if I remember correctly?

A. No, I believe—

Q. Was it eight to two?

A. Yes, that would be more—it was something like seventy-eight to—seventy-eight to seventy-nine percent of the tax—I'm sorry. I'm confused.

Q. Think it out.

A. Explain what you were really asking, Walter.

Q. All right. I'm saying, did you convert the domestic and look at their actual financial statements and take a domestic and convert it, so to speak, for tax purposes only, call it an as-if foreign corporation, take the same corporation and apply the foreign franchise tax rates and base and calculate what the domestic would have paid as it did [73] as a domestic and what it would have had it been a foreign corporation?

A. Yes. And it would have been in the neighborhood of eight to one.

Q. Eight to one, I thought, was right.

Now, I believe that in your testimony in that case, the White case, that you said you did not use an allocation factor. And what I'm saying, you used a hundred percent allocation, that all of the property of the domestics was employed in Alabama.

A. Yes.

Q. But that this wasn't a significant factor and did not really have any substantial effect on your conclusions; is that correct?

A. I don't remember that I testified to that, but I would now say that that would be substantially correct. That the great majority of the capital being employed by domestic corporations would, in fact, be employed in Alabama overall.

Q. Now—

A. Let me change that great majority to say a [74] substantial majority.

* * * *

[82] Q. One thing that—Let's go back to the domestics. Go back to par value for a moment, which is the base used by domestic corporations if, indeed, they have a par value.

A. Okay.

Q. If it's a no-par value domestic corporation, you use stated value, is that correct, for that domestic?

A. Yes.

Q. And stated value, again, is just what the incorporators say it is. Has no relationship whatsoever to the amount—the value, the actual value of the capital stock.

A. That's correct.

Q. And it, too, can be manipulated by the incorporators to be any figure they want it to be, and thereby reduce—if they reduce the stated value, reduce the domestic franchise tax?

A. Yes.

* * * *

[105] Q. With regard to the differentiation, [106] inequality, whatever you want to call it, between the domestic franchise tax and the foreign franchise tax, do you know of any legitimate state purpose for having a different franchise tax base between domestics and foreigns, other than with foreigns you can only use the

capital employed within the state? Other than that distinction, can you think of any legitimate state purpose for having a different tax base?

A. No.

Q. All right. Is there any legitimate state purpose that you can think of that would justify a disproportionate burden of franchise tax between domestics and foreigns?

A. No.

Q. Does Alabama—the State of Alabama or any of its agencies provide foreign corporations with any services that it doesn't provide domestic corporations? And that's foreign corporations within this state.

[107] A. None that I know of.

Q. Does it incur any substantial cost regarding foreign corporations that it doesn't incur with regard to domestic corporations?

A. None that I know of.

Q. Is there any rational basis within your knowledge as to why foreign corporations are taxed differently than domestic corporations other than the law—the Alabama law?

A. No.

* * * *

[Exh. 17]

ESTIMATED CORPORATE SHARES TAX BY COUNTY AND COMPUTATION OF AVERAGE STATE-WIDE MILLAGE RATE PAID ON CAPITAL STOCK BY DOMESTIC CORPORATIONS

Computation of Average Shares Tax Millage Rate 1982-1992

Tax Year	Taxable Residue	Estimated Tax	Average Millage
1982	220,753,542	9,635,155	0.04365
1983	255,984,833	10,810,740	0.04223
1984	303,091,259	12,755,810	0.04209
1985	294,683,754	12,547,251	0.04258
1986	301,867,209	12,600,092	0.04174
1987	356,938,434	15,226,560	0.04266
1988	343,409,485	14,293,941	0.04162
1989	482,336,486	19,922,054	0.04130
1990	439,023,555	18,401,718	0.04192
1991	490,090,432	21,036,205	0.04292
1992	490,104,967	20,877,536	0.04260
TOTALS	3,978,283,956	168,107,061	0.04226

• • • • •

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

AFFIDAVIT OF ADELE HOWELL SHEPHERD

STATE OF GEORGIA)

FULTON COUNTY)

Before me, the undersigned authority, in and for said County and State, personally appeared Adele Howell Shepherd, who being known to me and who being by me first duly sworn, does on her oath depose and say as follows:

1. My name is Adele Howell Shepherd. I am employed by BellSouth Corporation as a Corporate Manager - Taxes, where I have since 1984 been responsible for research, audit and compliance for all types of taxes other than income taxes for BellSouth Corporation and its unregulated ventures. My staff prepares and files the Alabama franchise tax returns for most to the BellSouth companies that are parties to this litigation. Since 1972 I have been employed by various BellSouth companies in the comptrollers (accounting) department and tax department. After completing my masters degree in accounting (Masters of Professional Accountancy at Georgia State University 1974) and passing the Certified Public Accountants examination, I was transferred to the tax department of Southern Bell Telephone and Telegraph in 1976 where I worked on the Southern Bell's federal income tax return. In 1978 I moved to internal auditing

with a major assignment to participate in audits of federal income tax returns prepared by other AT&T subsidiaries. I subsequently worked on the federal income tax audit in the AT&T Tax Department in New York for two years. In 1982 I transferred to Southern Bell as District Manager in Other (non-income) Taxes where I was responsible for the research, audit and compliance functions for payroll taxes, state sales and use taxes, state gross receipts taxes, state franchise taxes and state intangible taxes. In 1984 I was transferred to BellSouth Corporation where I have been employed in my present capacity.

I am familiar with the operations of and the Alabama franchise tax returns of all of the BellSouth companies that are party to this litigation (i.e. BellSouth Telecommunications, Inc., South Central Bell Telephone Company, BellSouth Corporation, BellSouth Services, Inc., BellSouth Products, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., Alabama Cellular Services, Inc., Sunlink Corporation, and TechSouth, Inc., all of which are incorporated in states other than Alabama, are qualified to do business in Alabama and are engaged in interstate commerce.

I have personal knowledge of the matters set forth in this affidavit which is made for use in opposition to the motion for summary judgment filed by the State of Alabama and the Commissioner of Revenue. In my capacity as Corporate Manager - Taxes I was assigned the responsibility of preparing the petitions for refund and other challenges of the Alabama franchise taxes paid by South Central Bell Telephone Company and the other BellSouth companies which have become parties to this litigation. These companies have filed petitions for refunds or challenges in each of the franchise tax years commencing in 1986 through the present time. The amount of tax paid by each of these taxpayers for each of the tax years is

accurately set forth in the complaints which have been consolidated into the present litigation. Each of the petitions and challenges was timely filed as was each of the appeals and complaints before this court. All were consolidated into the current action challenging the Alabama franchise tax levy on these corporations which were organized under the laws of states other than the state of Alabama and as such are required to pay Alabama franchise taxes as foreign corporations pursuant to Al. Code 1975 Section 40-14-41.

2. In connection with these challenges of the Alabama franchise tax scheme and the discriminatory tax burden on these BellSouth Companies, I was assigned the job of developing evidence to support the premise that the Alabama franchise tax scheme as applied is arbitrarily discriminatory in favor of domestic corporations organized under Alabama law to the detriment of these foreign corporations. To develop this evidence, consolidated discovery including interrogatories, requests for admissions and requests for production were filed on June 24, 1991. In response to the production requests, the State provided a computer printout detailing certain data elements and franchise tax amounts paid by foreign and domestic corporations for the years 1988 through 1991 (several boxes full), together with copies of studies prepared by the Department of Revenue in connection with various legislative proposals. The computer printout was introduced into evidence as Exhibit 19 to the deposition of Ernest Broadhead, Chief of the Franchise Tax Division, Alabama Department of Revenue. The balance of production is on file with the Court and is attached to the taxpayers' response to motion for summary judgment. The data produced was analyzed by me and the staff of my office and the memorandum attached hereto was prepared by me and my staff showing how the Department's data demonstrated that the Alabama tax scheme resulted in discrimination in favor of domestic corporations to the

detriment of foreign corporations. The memorandum and schedule prepared from this data is attached to this affidavit as Exhibit 1 and made a part hereof.

3. The information produced by the Department provided a sample of domestic and foreign corporations, their franchise tax payments, estimated domestic shares tax, total capital employed and included the allocation factor for each of these corporations from which to determine "capital employed" in the State of Alabama and a calculation of the capital employed in Alabama. (Copy attached as Exhibit 2 and made a part of this affidavit.) Using the Department's available data, this calculation was made on the schedule attached as Exhibit 1, utilizing the actual allocation factor developed by the Department of Revenue from its record. In the *Reynolds* case, the Department used similar information to determine the "as if foreign" franchise tax liability of the domestic corporations, but these calculations were not accepted as conclusive by the Alabama Supreme Court because the Department failed to use the allocation factor available to it, but rather calculated "as if foreign" franchise tax liability on the assumption that most or all domestic corporations employed all of their capital in the State of Alabama.

4. The primary function of my involvement in the franchise tax challenge was developing a methodology for accurately comparing the domestic franchise tax burden with the foreign franchise tax burden to demonstrate discrimination in favor of domestic corporations and detrimental to foreign corporation including the BellSouth taxpayers. Using the *Reynolds* opinion as a road map of pitfalls to avoid, we determined that actual, corporation-specific information should be developed rather than the use of averages and illustrative data which were dismissed as not being conclusive. The BellSouth taxpayers and companion CSX taxpayers determined that the methodology would include more detailed and conclusive evidence based on actual data contained in the tax returns filed by specific corporations. To this end methodology was developed that would enable these taxpayers to compute an "as if foreign" franchise tax liability for domestic corporations, based on an actual determination of the capital employed in Alabama utilizing the property allocation factor determined from the tax returns, and to compare that "as if foreign" liability with the amount of domestic franchise tax actually paid by the same corporations. Based on this methodology, an "as if foreign" franchise tax liability would be computed for each domestic corporation by preparing a simulated foreign franchise tax return for each domestic corporation based on the amount of capital actually employed by the domestic corporation in Alabama.

5. Because of the massive amount of data contained in the computer printout produced by the Department and the lack of complete information contained thereon, a a second request for production sought all data in the Department's possession relating to franchise tax liabilities of domestic and foreign corporations and domestic shares tax paid by domestic corporations in magnetic medium form. The state responded by providing five magnetic tapes containing four files: (1) "FRAN FOR RV.FT.FF. ALL.YRS", (2) "RV.FT.FD.ALL.YRS FRAN DOM", (3) "RV.FT.SHARES.ALL.YRS" and (4) "RV.FT. CNTY.DIST.ALL.YRS". In addition, the Department provided a record layout for each file.

These magnetic tapes were introduced as Exhibit 18 to the deposition of Ernest Broadhead.

6. These magnetic tapes and record layouts were delivered to Elrick & Lavidge, a computer subsidiary of Equifax Corporation. Elrick read the tapes and printed out records for our review. However, it was determined that much of the supporting financial information, includ-

ing financial data such as balance sheet data, required to be provided with franchise tax returns and with domestic shares returns, was not included in the state's computerized files. The initial plans were to compute "as if foreign" franchise tax liability for each domestic corporation using the state's computerized files. However, the state's computerized files do not contain complete financial data in many instances, such as balance data necessary for the "as if foreign" calculations. We determined that it was necessary to review to the various tax returns to have access to the necessary supporting financial information to accurately compute an "as if foreign" franchise tax liability for each domestic corporation.

In view of the massive volume of information necessary to be accumulated manually, because of the incomplete computerized information, and because using all the domestic franchise tax returns would have produced an unmanageable mass of paper, it was determined that it was necessary to develop a statistically valid sample to perform the necessary computations. Dr. Larry Richards, a statistician who is the Chairman of the Decision Sciences Department of the School of Business at the University of Oregon and who has vast experience as a statistician employed to conduct studies relating to taxation, was enlisted to help design a statistically valid sample of domestic franchise tax accounts. Dr. Richards had Ray Beard of Elrick & Lavidge perform a frequency distribution of domestic corporations based on a ratio of each corporation's net worth to its total par value of capital stock. Mr. Beard was instructed to use and did use the data element "SHARES-TOTSHARES" from the domestic shares tax tape for net worth and the data elements, "FD-PARCOM," "FD-PARPFRD," "FD-TOTALCOM," and "FD-TOTALPFRD," from the domestic franchise tape to develop total par value in accordance with the following formula: ([FD-PARCOM times FD-TOTALCOM] plus [FD-PARPFRD times FD-TOTALPFRD]).

To compute this ratio of net worth to total par value it was necessary to have a corporation which appeared on both the domestic franchise tax tape and the domestic shares tax tape because data elements from both of these tapes were necessary to compute the ratio.

After Beard had computed the ratios and performed a frequency distribution with 30 classes, Dr. Richards stratified the population for each year into seven groups, as follows:

Strata	*Ratio*
1	0.0
2	0.01-2.60
3	2.61-55.00
4	55.01-130.00
5	130.01-450.00
6	450.01 and over
7	Alabama Power Company

Alabama Power was included as a separate stratum because it is larger in size than any other domestic corporation and its inclusion in any other stratum would most likely have distorted that grouping.

After the strata were established, Dr. Richards determined a sample size of 25 from each stratum for each of the four years (1988-1991) covered in the computer tapes would provide adequate reliability. To ensure that the sample include 25 domestic corporations with adequate financial data from which compute an "as if foreign" franchise tax liability, Dr. Richards instructed Ray Beard to draw a true random sample of 100 accounts for each stratum for each year. The total sample drawn would give a minimum of 604 franchise tax returns and 600 shares tax returns (Alabama Power files no shares tax returns) and a maximum of 2404 franchise tax returns and 2400 shares tax returns.

7. To complete the financial data, the State provided access to its records for the making of copies of the domestic franchise tax returns and the domestic shares tax returns for the sample corporations. I, along with James Hanford, CSX Transportation, supervised and participated in the pulling and copying of these returns. Domestic franchise tax returns were pulled first. For each stratum, the franchise tax returns were pulled until there were 25 accounts with adequate balance sheet data. Shares tax returns were then pulled, again until there were 25 accounts with adequate balance sheet data. If this resulted in more domestic shares tax returns for a particular stratum, a corresponding franchise tax return was then pulled. A separate second effort was made to locate any tax returns that had been missing at the time of the first attempt to locate that record. Upon completion, 1,078 domestic corporations had their tax returns pulled. The distribution of the domestic corporations within the sample and by stratum is accurately set forth in tables 2a-2d appearing as pages 11, 12, 13 and 14 of the study prepared by Dr. Richards, a photocopy of which tables is attached hereto as Exhibit 3 and made a part of this affidavit.

8. The domestic franchise tax returns and domestic shares tax returns were reviewed by me and Jim Hanford of CSX Transportation or under our supervision. It was determined by this review that these returns did not provide all the data requested to be included on the returns. Without this information we would be unable to determine positively whether a corporation's financial data contained certain elements that figured into an "as if foreign" franchise tax computation. (e.g., deferred income taxes, investment in subsidiaries, etc.). State income tax returns which require comparable data were requested for the sampled corporations. Pursuant to court order the Department of Revenue pulled the Alabama income tax

returns of the sampled corporations and permitted the same to be copied for use in our data study.

9. Upon obtaining copies of all domestic franchise tax returns, domestic shares tax returns and state corporate income tax returns, a separate file folder containing all returns for each corporation in the sample was labeled with tax year, stratum, account number, and selection (001-100). These folders are filed by stratum and by tax year. The file folders containing the domestic franchise tax returns, the domestic shares tax returns, the Alabama corporation income tax returns, and the completed input worksheets are made Exhibit 4 to this affidavit and made a part thereof. Because of the volume of these records, taxpayers retain possession until the records are needed by the Court.

10. Jim Hanford and I designed an input worksheet upon which to accumulate data to be input into a program developed by Elrick & Lavidge to compute an "as if foreign" franchise tax liability for each domestic corporation in the sample. This worksheet is attached hereto as Exhibit 5 and made a part hereof. A sample file folder with the completed input worksheet is attached as Exhibit 6. The input worksheets were filled out by Jim Hanford and/or me or under our direct supervision using the data available in the three tax returns and attachments for each of the sampled domestic corporations. To provide for consistency in the comparison of domestic tax paid with an "as if foreign" franchise tax for each of the same domestic corporations, the balance sheet and associated detail that supported the domestic franchise tax return was used, including the balance sheet from a prior year's income tax return where the taxpayer reported on a fiscal year basis. A fiscal year balance sheet is permitted by statute (Sec. 40-14-44).

Of the data elements required to compute an "as if foreign" franchise tax liability, some were readily avail-

able on the corporation's balance sheet (e.g., capital stock, surplus, long-term debt, etc.) or from the detail required to be provided for certain balance sheet accounts (e.g., detail for "other liabilities" or "other current liabilities" should disclose any deferred income taxes). Other data elements were readily available from the shares tax return (e.g., value of air and water pollution control equipment). Certain data elements were not readily available from the tax returns and supporting schedules obtained from the state. A discussion of each data element and the steps taken to compensate for the data not being available follows.

A. *Inclusions*

(1) Accelerated depreciation or amortization—Information needed to estimate this data element would generally be available only through a detailed review of a company's fixed asset and depreciation records which are not required to be provided with any tax return.

Treatment in the "as if foreign" tax computation: No attempt was made to estimate this data element. Since it would increase the tax base, excluding it understates the "as if foreign" franchise tax liability and the amount of discrimination that occurs. Therefore, excluding it is a conservative position that favors the state.

(2) Debt payable to individual shareowner who owns more than 10% of the capital stock of the corporation—Debt payable to shareowners is a separate line item on the balance sheet in the domestic franchise tax return and on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" tax computation: In many instances (especially for Subchapter S and other closely held corporations), we were able to determine the exact ownership of the corporation and thus determine whether any debt payable to shareowners shown on the balance sheet was payable to an individual who owns more than 10% of the corporation. Where we were not able to make this determination, the debt was excluded from the "as if foreign" franchise tax capital base—a conservative treatment that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(3) Debt payable to another corporation that owns more than 50% of the capital stock of the corporation—As indicated in (b) above, debt payable to shareowners is a separate line item on the balance sheets.

Treatment in the "as if foreign" tax computation: Where a balance sheet indicated debt to shareowners and corporate shareowners was involved, we were seldom able to determine that one corporation owned more than 50% of the stock. Where we could not make that determination, the debt was excluded from the "as if foreign" franchise tax capital base—a conservative position that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(4) Debt payable to a more than 50% owned subsidiary that is not required to pay Alabama franchise tax—Debt payable to subsidiaries is not a separate line item on the balance sheet.

Treatment in the "as if foreign" tax computation: We were virtually never able to identify this item. To the extent this item was buried in with debt to affiliates or other types of accounts payable, it was excluded from the "as if foreign" franchise tax capital base—a conservative position that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(5) Deferred income tax—Deferred income tax is not a separate line item on the balance sheet in the domestic franchise tax return or on the balance sheet schedule for the domestic income tax return. It is generally included in "other liabilities" or "other current liabilities."

Treatment in the "as if foreign" tax computation: When detail was provided as required for "other liabilities" or "other current liabilities," we were generally able to determine an amount (zero or otherwise) for deferred income taxes. Where no detail was provided, we could not make this determination and, to the extent the undetailed liability accounts included deferred taxes, this amount was excluded from the "as if foreign" franchise tax capital base—a conservative position that understates the "as if foreign" franchise tax and, therefore, favors the state.

B. *Exclusions*

(1) Investment in the capital of other corporations paying the Alabama franchise tax—Investments in subsidiaries is not a separate line item on the balance sheet in the domestic franchise tax return or on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" franchise tax computation: If there was an amount on the "Other investments" line on the balance sheet, it was treated as an exclusion even if it was not possible to determine that the investment was in a corporation paying the Alabama franchise tax. This reduced the "as if foreign" tax base and is a conservative position that understates the "as if foreign" franchise tax and, therefore, favors the state.

(2) Investment is subsidiaries operating exclusively outside Alabama—same as item 2a, above.

C. *Deductions*

(1) Investment in securities issued by Alabama or its political subdivisions—Investment in federal and state securities is a line item on the balance sheet in the domestic franchise tax return and on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" franchise tax computation: If the balance sheet indicated investment in federal and state securities, the amount was treated as a deduction unless it could be positively identified as federal obligations or as securities of a state other than Alabama. This is a conservative position that understates the "as if foreign" franchise tax liability and, therefore, favors the state.

(2) Mortgages receivable on Alabama real estate on which recording privilege tax has been paid—Mortgages receivable is a separate line item on the balance sheet in the domestic

franchise tax return and on the balance sheet schedule for the domestic income tax return.

Treatment in the "as if foreign" franchise tax computation: If there were mortgages receivable, they were treated as a deduction from the "as if foreign" franchise tax base even if it was not possible to determine that they were related to Alabama real estate or, if so, that the recording privilege tax had been paid. This is a conservative position that reduces the "as if foreign" tax base for any account with mortgages receivable and, therefore, favors the state.

(3) Book value of property used in manufacturing in qualifying counties—The deduction from the foreign franchise tax base for certain manufacturing property (Ala. Code Sec. 40-14-41(d)(2)d) is the same as the deduction from the domestic shares tax base (Ala. Code Sec. 40-14-70(d)(3)) that was available during at least part of the years involved here (1988-1991). However, there is no place on the domestic shares return to list such a deduction from the shares tax so we could not rely on the shares tax return for this data element.

Treatment in the "as if foreign" franchise tax computation: Manufacturers in the sample were identified. The county or counties in which these manufacturers operate were identified through information on the various tax returns. A list of counties in which a manufacturer could have qualified for a deduction for manufacturing property during each tax year was developed by comparing unemployment rates for each of Alabama's

counties for each tax year to the national average for that year. Information for this analysis was obtained from the Alabama Department of Industrial Relations. For manufacturers with property located in qualifying counties, an estimate of book value of property used in manufacturing (computed as described in the following paragraphs) was included as a deduction in the "as if foreign" tax computation.

A list of the seven (and only) foreign corporations (and their franchise tax account numbers) that have ever qualified for a manufacturing deduction under Sec. 40-14-41(d)(2)d was obtained from the Department of Revenue. For each of those seven, we pulled from the foreign franchise tax tape provided by the Department ("FRAN FOR RV.FT.FF.ALL.YRS") the data elements "ALA-CAPT" (franchise tax base before deductions) and "VALUINVS" (book value of manufacturing property deducted from the franchise tax base). We used these data elements to develop a composite ratio of VALUINVS to ALACAPT for each year.

For each domestic manufacturer located in a qualifying county, we computed an estimated deduction for manufacturing property by multiplying the "as if foreign" franchise tax base before deductions times the composite ratio of VALUINVS to ALACAPT for foreign corporations developed as described in the preceding paragraph.

We included such a deduction even though the Department of Revenue advised that no domestic corporation has ever qualified for a

manufacturing exemption on its domestic shares tax return (and only seven foreign corporations have qualified for an exemption on the foreign franchise tax return). This is a conservative position that understates the "as if foreign" franchise tax base and, therefore, favors the state.

(4) Other—If there was any asset item whose character could not be identified, it was treated as a deduction from the franchise tax base. For example, if a taxpayer did not provide the requested detail for the "other assets" or "other current assets" account, the amounts in these accounts were assumed to be eligible to be deducted from the franchise tax base as, for example, investments in Alabama securities. This is a conservative position that understates the "as if foreign" tax liability of the accounts in the sample and, thus, favors the state.

D. *Apportionment*

The Alabama statute levying the foreign franchise tax imposes the tax on "capital employed in Alabama." The statute provides no guidance on how capital is to be apportioned to Alabama for a multi-state company. Instructions on the foreign franchise tax return and in regulations describe certain apportionment factors, including property, to be used for various types of businesses.

In many states, the data needed to compute apportionment factors for most types of companies would be available in the company's income tax return. However, Alabama does not use apportionment except for Subchapter S corporations. Therefore, the data needed to compute all the

different possible apportionment factors was not generally available. "Capital employed in Alabama" was derived by apportioning with the one factor—property—that could be ascertained with accuracy for each account. The use of the property factor is consistent with the decisions of the Alabama Supreme Court. Thus, for developing the "as if foreign" franchise tax base, capital was apportioned to Alabama using the property factor derived as follows: Property located outside Alabama (obtained from the domestic shares tax return) was subtracted from the book value of total property obtained from the balance sheet. The remainder was Alabama property and was divided by book value of total property to obtain an apportionment factor.

11. An "as if foreign" franchise tax liability was computed for each corporation in the sample. These computations were performed by Ray Beard using a program he developed based on instructions prepared by me in conjunction with Jim Hanford, a copy of which instructions is attached hereto as Exhibit 7 and made a part hereof. The results of those computations are detailed for each corporation in Exhibit 8, attached hereto and made a part hereof.

Additionally, an average estimated domestic shares tax liability was computed for each corporation, although the statute—Sec. 40-14-70(a)—specifically provides that this domestic shares tax shall be assessed to the person in whose name the shares stand on the books of the corporation and not to the corporation. This average estimated domestic shares tax liability was computed in two different ways for each tax year using data from several sources. One computation was performed using the maximum millage rate in a county for the applicable tax year; the other computation used a statewide weighted composite

average millage rate provided by the Alabama Department of Revenue.

For the first computation, a table of county rates was developed which rates were the maximum for each county for each tax year, 1988-1991, and were taken from data provided by the Department of Revenue, Public Utility Section, Ad Valorem Tax Division. Ray Beard, who developed this table of county rates from the data furnished, then multiplied the shares tax base for each account (data element "SHARES-RESIDUE" from the shares tax file, "RV.FT.SHARES.ALL.YRS SHARES") times the maximum tax rate applicable for the county shown on that account (data element "SHARES-CNTY-CODE" on the shares tax tape) to obtain an "estimated shares tax" for that account. This computation was performed for each account on the shares tax tape, not just those included in the sample. The sum of the total estimated shares tax amounts for each tax year was divided by the total number of domestic accounts on the shares tax file for that tax year to produce an "estimated average shares tax" liability for that year. Because the maximum rate for each county was used for the computation, this "estimated average shares tax" is overstated.

For the second computation, Beard provided to Dr. Richards the sum of the data element "SHARES-RESIDUE" for all domestic shares tax accounts for each tax year, together with the total number of domestic shares tax accounts for each year. Dr. Richards computed an "estimated average shares tax" for each tax year by multiplying the total domestic shares tax base times the statewide average millage rate provided by the Department of Revenue, and then dividing the product by the total number of domestic shares accounts.

12. In my opinion as a tax professional with approximately 11 years of experience dealing with state franchise taxes imposed upon corporations including the Alabama

franchise taxes, I am of the opinion that the methods employed as set forth in this affidavit are proper for the development of an accurate comparison between the domestic franchise tax actually paid by a domestic corporation and the "as if foreign" franchise tax liability of that same corporation, and that the methodology employed is proper and the result of the methodology was accurate.

/s/ Adele Howell Shepherd
ADELE HOWELL SHEPHERD

[Notary Omitted]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

AFFIDAVIT OF LARRY E. RICHARDS, Ph.D.

STATE OF OREGON)

COUNTY OF LANE)

Before me, the undersigned authority, in and for said County and State, personally appeared Larry E. Richards, who is known to me, and, being first duly sworn upon his oath, deposes and says, as follows:

1. My name is Larry E. Richards. I am presently Chairman of the Decision Sciences Department at the University of Oregon. Decision sciences include the science of applied statistics. I have served as an expert professional statistician in numerous capacities, including conducting research and studies and testifying as an expert witness in numerous cases challenging state taxes, for a period of more than 20 years. Additionally, attached as Exhibit "A" hereto and incorporated herein by reference is a true and correct copy of my vita. I have personal knowledge of the matters set forth in this affidavit which is made for the purpose of opposing a Motion for Summary Judgment in the captioned litigation challenging the Alabama franchise tax scheme.

2. I was employed by the Taxpayers in this litigation which include BellSouth Corporation and its related companies, including South Bell Telephone Company ("BellSouth Companies") and CSX Transportation, Inc. ("CSXT") to conduct a statistical study to determine

whether the Alabama franchise tax scheme was discriminatory between domestic and foreign corporations prior to 1992. I was made familiar with and furnished information in the form of computer tapes and printouts relating to the Alabama domestic and foreign franchise taxes and the Alabama domestic shares taxes, and data collections and calculations taken therefrom, and based on my review of this information and discussions with Adele H. Shepherd of the BellSouth companies and James D. Hanford of CSXT, among others, I developed the methodology for accomplishment of a comparison between a domestic corporation as it is actually taxed and that same domestic corporation taxed as if it were a foreign corporation. Included within the methodology designed by me was the development of a ratio of corporate net worth to par-value and the design and development of 7 strata from which domestic corporations were randomly selected. A design of the ratio, strata and the method and number of the randomly selected domestic corporations was developed by me.

Throughout the accumulation of the data for the study, I was directing Ray Beard of Elrick & Lavidge, computer subsidiary of Equifax Corporation, to read the computer tapes furnished by the Alabama Department of Revenue and printed out records to implement the ratio designed by me, and to randomly select the sampled corporations in accordance with the number and strata designed and directed by me. Throughout the development of data, I consulted with and directed the operations by Adele Shepherd and James Hanford to determine that the same were being conducted in a statistically correct and accurate manner.

3. Based on the foregoing information which was received from the actual tax returns filed by the sampled corporations, including the domestic franchise tax return, the domestic shares tax return and the corporate income tax return, I then conducted a statistically valid study of

the sampled Alabama domestic corporations treated as if foreign corporations to determine if there were franchise tax discrimination and the extent of any such discrimination between domestic and foreign corporations.

Attached hereto as Exhibit "B" and incorporated herein is "A Study of the Differences in the Franchise Tax Liability for Foreign vs. Domestic Corporations in Alabama," which was performed and prepared by me, based on data and information taken from actual tax returns and developed according to my statistical design from the production made by the Alabama Department of Revenue. The statistical procedures that were applied in this research (stratification, sampling, estimators, tests and interval estimates) have mathematical (provable) foundations and are in accordance with generally accepted valid statistical practice and procedures. The data used to perform this analysis were provided by or obtained from the State of Alabama Department of Revenue and its collection and use was performed under my direction and supervision, and the facts, information, finding and conclusions contained therein are true and correct.

Additionally, I have reviewed the affidavit of Adele Howell Shepherd which was prepared in connection with this litigation, which details the methodology employed and the results, which are proper and are in generally accepted valid statistical practice and procedure.

4. Based on my personal knowledge and the study conducted by me, at least for the years 1988-1991, foreign corporations in Alabama, including the Taxpayers BellSouth Companies and CSXT have been victims of discrimination in the levy and payment of corporate franchise taxes in Alabama. Based on the data furnished and the results calculated therefrom, the conclusion is inescapable that the Alabama franchise tax scheme as applied has in fact resulted in discrimination in favor of domestic corporations and to the detriment of foreign corporations, including the Taxpayers. By comparison,

during the years 1988-1991, the amount of "as if foreign" franchise tax liability calculated for a domestic corporation based on the foreign franchise tax statute is 5 times more than the domestic franchise tax actually paid by the same corporation, and the percentage of discrimination between the two is more than 400%, as shown on the table on page 2 of my study. Likewise, a comparison between the sum of the domestic franchise tax actually paid plus the domestic shares tax for each of the domestic corporations with the "as if foreign" franchise tax liability for each of the same domestic corporations demonstrates that foreign corporations pay approximately 2 times as much Alabama franchise tax as the total franchise tax plus shares tax of a domestic corporation considering the sum of both domestic franchise tax and domestic shares tax. In effect, the tax rate for these domestics taxes as domestics based on their capital employed in Alabama is approximately $1.50 versus $3.00 per $1,000 rate taxed "as if foreign."

[Notary Omitted]

EXHIBIT "A"

LARRY EARL RICHARDS
Chairman of Decision Sciences
College of Business Administration
University of Oregon
Eugene, Oregon 97403
(503) 346-3315

EDUCATION

A.A. (1960)
Lower Columbia College, Longview, Washington

B.A. (1962)
University of Washington, Seattle, Washington

MBA (1963)
University of Washington, Seattle, Washington

Ph.D. (1969)
University of California at Los Angeles,
Los Angeles, California

PROFESSIONAL EXPERIENCE

Consultant to:

1. Los Angeles County Regional Planning Commission, 1965
2. State Department of Public Health of California, 1965
3. Bank of America, 1968
4. Farwest Steel Service Center, 1970
5. Lane Plywood Inc., 1972
6. Monroe, Litton Industries, 1972

7. Simpson Timber Co., 1976
8. Pacific Power and Light, 1977, 1980
9. Federal Trade Commission, 1978
10. Portland General Electric, 1980
11. Georgia Pacific Corp., 1980
12. Stretch & Sew Inc., 1981
13. Willamette Timber Systems, 1981
14. Association of Reforestation Contractors, 1981
15. Columbia Basin Reforestation Inc., 1984
16. Oregon Department of Human Services, 1986
17. Oregon Public Utility Commission, Motor Transport Audit Division, 1986-1989
18. Oregon Public Utility Commission, Motor Transport Safety Division, 1987-1989
19. Union Pacific Railroad, 1987-1992
20. Burlington Northern Railroad, 1988-1992
21. CSX Corporation, 1992
22. Bell South Corporation, 1991-1992

PROFESSIONAL SERVICE

1. Co-Program Chairman, Western Region of the American Institute for Decision Sciences, 1974-1975.
2. Co-Program Chairman, National, the American Institute for Decision Sciences, 1977-1978.
3. Secretary-Treasurer, Oregon Chapter of the American Statistical Association, 1977-1979.
4. Vice-President, Oregon Chapter of the American Statistical Association, 1979-1981.

5. Participant as session chairman and/or discussant at the following meetings:

   a) National Decision Sciences Institute conferences

      Atlanta 1974
      Cincinnati 1975
      Chicago 1977
      St. Louis 1978
      Las Vegas 1980
      Boston 1981
      San Francisco 1982
      San Antonio 1983

   b) Western Region Decision Sciences Institute conferences
      San Francisco 1974
      Las Vegas 1975
      San Diego 1976
      Phoenix 1977
      San Diego 1978
      Reno 1979

PUBLICATIONS

1. "Refinement and Extension of Distribution-Free Discriminant Analysis," *Journal of the Royal Statistical Series C. Applied Statistics*, 1972, 21.
2. "A Note on Model Specification," *Journal of Finance and Quantitative Analysis*, VII, No. 3, 1972.
3. "Detection of Unexplained Joint Effects Through an Analysis of Residuals," *Decision Sciences*, IV, No. 1, 1973.
4. "Distribution-Free Significance Tests for Choosing Among Prediction Equations," *Decision Sciences*, VI, No. 2, 1975.

5. "Detection and Incorporation of Interactive Effects in Discriminant Analysis," *Decision Sciences*, VI, No. 3, 1975.
6. "An Efficient Algorithm for Fisher's Randomization Test," *Western Region DSI Proceedings*, 1976.
7. "Interim Inventory Valuation Strategies," *Western Region DSI Proceedings*, 1977.
8. *Business Statistics: Why and When*, with Jerry LaCava, McGraw-Hill Book Co., 1978.
9. *Study Guide/Workbook for Business Statistics: Why and When*, with Arno Rethans, McGraw-Hill Book Co., 1978.
10. "What Can Be Done About Interviewer Bias?" *Research in Marketing*, III, 1979, with Donald S. Tull.
11. "Randomization Test For Two Independent Samples Made Practical," *Western Region DSI Proceedings*, 1980.
12. *Business Statistics: Why and When*, 2nd.Edition 1983.
13. "Random Response Modeling with Responder Set Probability," *Western Region DSI Proceedings*, 1985.
14. "Multivariate Analysis of Variance," Bray & Maxwell, Book Review, *Journal of Marketing Research*, May 1987.
15. "Principal Component Analysis," I.T. Jolliffe, Book Review, *Journal of Marketing Research*, November 1988.
16. "Statistical Analysis with Missing Data," Little & Rubin, Book Review, *Journal of Marketing Review*, August 1989.
17. "Randomization Test for Two Independent Samples," *Journal of the Royal Statistical Society-Series C Applied Statistics*, to appear.

RECENT PRESENTATIONS

1. "Use and Abuse of Statistical Techniques in Taxation and Regulation" National Association of Railroad and Public Utility Tax Representatives, 1988 Annual Conference, Lake Tahoe.
2. "A Forecast of Forecasting Income—±3%" Appraisal of Utilities & Railroad Property for Ad Valorem Taxation, 1989 National Conference, Wichita.
3. "Development of Real and Personal Equalization Ratios" National Association of Railroad Property and Public Utility Tax Representatives, 1991 Annual Conference, Victoria, British Columbia.

ADMINISTRATIVE POSITIONS:

1. Chairman of the Department of Accounting and Quantitative Methods. 1974-1977.
2. Director of the Undergraduate Program, College of Business Administration. 1979-1981.
3. Director of Graduate Programs, College of Business Administration. 1981-1983.
4. Chairman of the Department of Decision Sciences. 1983-present.
5. Director of the Oregon Executive MBA Program, 1989-1991
6. Director of the Ph.D. Program. 1992-

UNIVERSITY SERVICE (Committees)

A. College of Business Administration

1. Personnel Committee, 1978-1979, 1981-1984, 1991-1992

2. Teaching Effectiveness, 1978-1980
3. Futures Committee, 1980-1981
4. MBA Committee, 1977-1978, 1981-1983
5. Ph.D. Committee, 1981-1983
6. Search Committees (nine in total)

B. University

1. University Evaluation Forms, 1976-1977
2. Evaluation of Administrators, 1977-1978
3. Committee on Statistics, 1976-1977
4. Chairman, Dean Search, 1976-1977
5. Chairman, Patent Policy Committee, 1981-1982
6. Intercollegiate Athletics Committee, 1981-1982
7. Chairman, Intercollegiate Athletics Committee, 1982-1983
8. Academic Support for Athletes, 1983-1984
9. Chairman, Committee on Statistics, 1984-present
10. Committee on Committees, 1985-1987
11. Personnel Committee, 1987-1988
12. Chairman, Personnel Committee, 1988-1989
13. Education Policy Committee 1991
14. Undergraduate Education Action Team 1991-1992
15. UO Strategic Plan Implementation Coordinating Committee 1992

RESEARCH SERVICE:

There have been 109 completed Ph.D. Dissertations in the College of Business Administration since 1972. I have

been a committee member on 61 of them, and the chairman of ten. I have also acted as consultant on perhaps fifteen additional dissertations, while not an official member of the committee.

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

AFFIDAVIT OF WAYNE WHITE

STATE OF ALABAMA)

JEFFERSON COUNTY)

Before me, the undersigned authority, in and for said County and State, personally appeared Wayne White, who being known to me and who being by me first duly sworn, does on his oath depose and say as follows:

1. My name is Wayne White and I am a Certified Public Accountant and a partner in the firm of Arthur Andersen & Co. located in its Birmingham, Alabama, office. I have been a practicing Certified Public Accountant in Alabama for more than 20 years and have more than 20 years of experience with Alabama state taxation of corporations, including domestic and foreign franchise taxes and corporate income tax, all of which are levied on the corporation, and ad valorem taxes imposed on the shares of capital stock owned by shareholders of domestic and foreign corporations. For more than 20 years, I have been regularly engaged by corporate clients to represent them in connection with Alabama taxation and before the Alabama Department of Revenue. Attached is a copy of my resume which is incorporated herein by reference. I make this affidavit from personal knowledge of the facts set forth herein for use in Opposition to the Motion for Summary Judgment filed on behalf of the State and the Commissioner of Revenue.

2. During the course of my practice as a Certified Public Accountant in Alabama, I have worked extensively with Alabama state taxation of corporations, including, specifically, Alabama domestic and foreign franchise taxation. Based on this experience and my expertise, I am of the opinion that the Alabama franchise scheme discriminates in favor of domestic corporations incorporated under the laws of Alabama to the detriment of foreign corporations incorporated under the laws of other states which do business in Alabama.

3. Discrimination in favor of domestic corporations results primarily from discriminatory differential in the tax base. By statute, the franchise tax is levied on domestic corporations under Ala. Code 1975, § 40-14-40 "based on its capital stock." To the best of my knowledge, the Alabama Legislature has provided no further definition nor guidelines upon which to determine the tax base. The Alabama Department of Revenue has, without any statutory basis, utilized and applied "par value" of capital stock as the domestic franchise tax base without legislative definition, standards or direction. In the case of "no-par stock," the domestic franchise tax base is determined at the date the stock is issued.

Domestic franchise taxes are, without any statutory basis, levied on a tax base of the "par value" of the capital stock of a domestic corporation, except where the stock is no-par. "Par value" has no relationship to the actual value of the corporation's capital stock. Domestic corporations can arbitrarily set and reduce the par value of their capital stock. It is my understanding that under Alabama corporate law, Alabama no longer has a minimum capital requirement, and shares may have any par value or no par value of the corporation's capital stock. Domestic corporarespect to "no-par stock," stock is valued at the date of issuance based upon consideration paid for the stock. Ala. Code 1975, § 40-14-23. However, a "no-par stock" corporation could be recapitalized utilizing "par stock" to

replace the "no-par stock" to reduce domestic franchise taxes.

By contrast, foreign franchise taxes are levied under Ala. Code 1975, § 40-14-41, on a tax base of "the actual amount of capital employed in this state," consisting of the real or actual value of the corporation's capital stock, including surplus and retained earnings plus long-term debt, certain related-party debt and accelerated depreciation. Without any inclusion within the statute, the Department of Revenue has added an additional component to "capital employed" by requiring the inclusion of "deferred taxes" within the total capital of a foreign corporation.

Thus, by virtue of the difference in the tax base, domestic corporations are undertaxed based on the improper application of the domestic franchise tax statute resulting in foreign corporations paying their unfair share of the Alabama franchise tax burden.

4. Based upon my understanding of the domestic franchise tax, "par value" has never been the standard adopted by the Alabama Legislature in the taxing statute. There was no domestic franchise tax prior to the early 1900s when the Legislature enacted a domestic franchise tax statute which defined the tax base as "paid-up" capital stock. This standard remained until 1935 when the statute was changed to levy the tax "based on its capital stock" which tax base has remained in effect until the present time. "Paid-up" capital stock is not the equivalent of par value of capital stock. "Paid-up" capital stock includes all of the consideration paid by the subscriber to the capital stock, including capital surplus. "Par value" by definition excludes capital surplus. The use of "par value" as a tax base for domestic franchise tax in itself is an arbitrary use of a fictional value rather than the real or actual value of capital stock. The use of "par value" as a tax base fails to account for the real value of the capital stock in a going concern. Moreover, under Alabama

corporate law, par value may be changed at any time by the corporation so as to decrease the par value of the capital stock. By decreasing the par value of the capital stock, a domestic corporation incorporated under the laws of Alabama may decrease or reduce its Alabama domestic franchise tax liability to the minimum tax of $50. In the event the domestic corporation is organized without "par value" capital stock, then pursuant to a recent amendment of Ala. Code 1975, § 40-14-23, valuation at the date of stock is issued is required. This likewise may be an entirely fictional amount having no relationship to the value of the domestic corporation's capital stock as a going concern after the passage of time. As previously indicated, "par value" is a fictional figure which may be arbitrarily set by the incorporators, which may not at the time of incorporation, and does not at any time after business commences, represent the real value of the capital stock or capitalization of domestic corporations. "Par value" may be arbitrarily reduced by the corporations at any time. Additionally, even in the case of "no-par stock," its initial issuance may have little relationship to its actual value.

5. Under Alabama statutory scheme, foreign but not domestic corporations incur increased franchise tax liabilities as they earn and retain income or increase indebtedness. Moreover, under Department's misapplication of "capital stock" by the arbitrary use of "par value," domestic corporations can unilaterally lower their franchise taxes either by establishing a low par value upon incorporation or by later reducing par value. Changes in "par value" for foreign corporations have no effect on the foreign franchise tax base or the foreign franchise tax liability.

6. In the practice of my profession, I have had the opportunity to represent and advise many corporations concerning Alabama franchise tax liability, both prior to incorporation and after incorporation. Based on my ob-

servations and, in some cases, my advice, most newly incorporated Alabama domestic corporations that I have worked with have utilized a minimal arbitrary "par value" to minimize domestic franchise tax liability. Likewise, existing corporations have changed the par value of their capital stock to minimize domestic franchise tax liability. Foreign corporations have been advised to and have incorporated under Alabama law a wholly owned domestic subsidiary with a minimal par value to minimize the total franchise tax liability. Utilizing this strategy, the domestic subsidiary may have limited its domestic franchise tax burden to the minimum amount (or a substantially decreased amount), while the parent foreign corporation is provided an exclusion from its tax base of the actual amount of its investment in the capital of other corporations organized under the Alabama laws. Thus, to induce incorporation under the laws of the State of Alabama, the Alabama franchise tax scheme provides tax incentives, which result in discrimination in favor of those corporations incorporating under Alabama laws to the detriment of and imposing a higher tax burden on foreign corporations solely on the basis of the state of incorporation.

7. In connection with advising corporations with respect to state taxation, I am familiar with and have prepared or had prepared under my direction numerous tax returns on the domestic shares tax imposed pursuant to Ala. Code 1975, §§ 40-14-70, et seq. This domestic shares tax is imposed solely on the shareholders of the corporation and not on the corporation. Section 40-14-70 provides specifically that "every share of any domestic corporation [with exceptions] shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or principal office in the state and shall be assessed at twenty percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation." Ala. Code 1975, § 40-14-73 permits the domestic corporation as a

volunteer to pay the shares tax imposed upon its shareholders, and the domestic shares tax return has a consent form to be executed by an officer of the domestic corporation agreeing to pay the tax. The domestic shares tax is levied as an ad valorem tax on the shares of capital stock, which are the property of the shareholders, and not of the corporation. The taxable event is the ownership of the shares of stock based on their value. The domestic and foreign franchise taxes are not ad valorem taxes, but are excise taxes for the privilege of corporate existence for domestic corporations and of doing business in Alabama for foreign corporations. The capital stock account on the books of the corporation is the property of the corporation—its capital account—to which the shareholders have no entitlement (except possibly on dissolution) while the shares of capital stock is the property of the shareholders to which the corporation has no claim. The taxable event or incident in the case of the franchise taxes is the incorporation in Alabama or the qualifying to do business in Alabama. Thus, the domestic shares tax is not comparable to the Alabama franchise taxes because taxes are levied on different persons (corporation versus shareholders), on a different tax base (capital stock versus shares of capital stock) and on a distinct taxable event (privilege tax or incorporation or doing business versus ad valorem tax on the value of property).

The domestic shares tax should not be considered as a part of the domestic corporation's tax burden nor as complementary to the franchise tax. Even if the shares tax is paid by the domestic corporation, the combined tax burden of the domestic franchise tax and domestic shares tax in my opinion and as shown by the study performed by Dr. Larry Richards is less than the average tax burden borne by the same corporation taxed as if it is a foreign corporation. I have reviewed the study performed by Dr. Richards and the methodology set forth in the affidavit of Adele Shepherd, and believe that the methodology

and study are reasonable and in my opinion reasonably reflect the computation of the "as if foreign" franchise tax liability for domestic corporations in Alabama, including the use of property factor for allocating "capital employed in Alabama." Based upon my years of experience in the Alabama franchise tax field and dealing with domestic shares taxation, the results of Dr. Richards' study confirm my own analysis and opinion that the Alabama franchise tax scheme discriminates in favor of domestic corporations and to the detriment of foreign corporations.

8. The Alabama domestic shares tax is complementary to the ad valorem tax imposed upon the shareholder/owner of the shares of capital stock in foreign corporations levied pursuant to Ala. Code 1975, § 40-11-1(9), which provides that the subjects of taxation shall be:

> "(9) Shares in corporations or associations, not incorporated under the laws of this state, except stock in national banks . . . ."

The domestic shares tax and the ad valorem tax on foreign shares each is imposed upon the shareholder/owner of the shares of stock; each is an ad valorem tax based on taxable incident of ownership on the same return date —October 1—and at the same taxable assessed value of twenty percent. Thus, under Alabama law, the same ad valorem tax, the same assessed value and at the same tax rate (although appearing in separate sections of the Code) is levied against shares of capital stock of domestic and foreign corporations.

9. Under the Alabama statutes, the tax base for the domestic shares tax is different from the tax base for the foreign franchise tax. The tax base for the foreign franchise tax return includes not just the value of the outstanding capital stock, including surplus and undivided profits, but also includes long-term debt, certain related-

party debt and accelerated depreciation by statute and deferred taxes by order of the Department of Revenue. The domestic shares tax base includes only the value of the shares of capital stock, not the capital account in the corporation and not any of the debt, accelerated depreciation or deferred taxes accounts. The domestic shares tax statute permits the deduction of the book value of all real and tangible personal property owned in other states and of inventory held for sale, among other deductions, before making a determination of the assessed value of the shares of stock. From the assessed value of all the shares the assessed value of all the taxable real and tangible personal property owned and assessed and on which taxes are paid by the corporation in Alabama are deducted. If the aggregate assessed value of the shares does not exceed the aggregate assessed value of real and tangible personal property of the corporation, then no tax is due. Thus, the only remainder of value of the shares of stock results from the value of intangible personal property, if any, because all real and tangible personal property, including inventory wherever located, is deducted from the shares tax base. Further, the purchase of short-term U.S. Government obligations at the end of a fiscal year could effectively eliminate any remainder being subject to tax.

/s/ Wayne White
WAYNE WHITE

[Notary Omitted]

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

[Caption Omitted]

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

December 14, 1994

Before: THE HONORABLE WILLIAM R. GORDON
CIRCUIT JUDGE

* * * *

[43] DIRECT EXAMINATION
OF ERNEST BROADHEAD

* * * *

[49] Q. Actually with regard to your study that you did in 1993—'83, excuse me, '83, that was the predecessor to this particular legislation, did you not determine that the foreign corporations paid eight times as much franchise tax as the domestics paid in franchise and shares tax?

A. That would be correct.

Q. Now, in calculating the calculation we are just talking about in your 1983 study, did you use an allocation factor in computing an "as if" foreign franchise tax liability?

A. No.

Q. You did not?

A. That's correct.

Q. Did you not use a 100 percent allocation assuming that all those corporations were domestic and had all of their [50] property in the state of Alabama?

A. I believe that was the case on that particular study. On another study, we tried something a little different.

Q. Right. But in that particular study was eight times as large, but you assumed that all of the property in the property allocation factor was Alabama property. So the factor you used was actually one hundred?

A. That's correct.

Q. Now, that was criticized. And the only reason I believe your study was criticized by the Alabama Supreme Court in *Reynolds* was because you assumed the 100 percent factor; is that correct?

A. That's correct.

Q. Now, if we divided that factor by two, which would mean an allocation factor of 50 percent, would it not still be a four to one ratio discriminating against foreign corporations?

A. There would be a four to one ratio, yes, sir.

Q. And that would mean the foreign corporations pay four times as much franchise tax as the domestics did, franchise and shares tax; is that correct?

A. That would seem to follow.

Q. And if we want to go down to a 25 percent factor, it would be two to one, would it not?

A. That's correct.

[51] Q. Do you consider the property factor as a true and accurate allocation factor and one that is commonly used by the Department?

A. The property factor alone?

Q. I'm asking, yeah, the property factor alone right now.

A. That would not in all cases reflect an accurate picture, no.

Q. But it is a factor that you commonly use and is required to be used by most corporations in Alabama as one of the factors?

A. As one of the factors, yes.

Q. And I believe that you have testified before that it is a valid factor to consider when you don't have other factors available to you; is that correct?

A. Yes.

THE COURT: I don't know the record is real clear on what y'all are talking about.

MR. BYARS: All right.

Q. In connection with the calculation of the foreign corporation franchise tax, as I understand the statute and the procedure of the Department, the Department has the elements of the tax base set forth in 40-14-41 which are outstanding—its capital stock outstanding?

A. Yes.

Q. And then adding to that would be surplus and retained earnings?

[52] A. Yes.

Q. And adding to that would be a long-term debt being debt over one year?

A. Correct.

Q. And added to that would be related party debt, and that's certain parties and corporations that own certain shares?

A. Intercompany debt.

Q. Intercompany debt. And lastly in the statute you have accelerated depreciation?

A. Yes.

Q. And all of these fit into the foreign corporation basic tax base; is that correct?

A. To determine the total capital employed everywhere.

Q. Correct?

A. Yes, sir.

Q. And then under the Section 232 of the constitution and also under 40-14-41 the levying statute, there is a way to allocate to Alabama the property that is employed or the capital that is employed in Alabama?

A. Yes.

Q. And that's what we are talking about in the allocation factor?

A. Yes.

Q. Is how much is actually allocated to Alabama?

A. That's correct.

[53] Q. And this is selected by certain factors; is that correct?

A. Yes.

Q. So the allocation factors we were talking about, property is the principal one for all corporations, is it not?

A. Property, I believe, will always be one of the factors.

Q. So if we assumed a 50 percent property factor, that is, half of its property is in Alabama and half is outside of Alabama, on the eight to one ratio you had, would that then reduce the ratio of discrimination between foreigns and domestics four to one?

A. Yes.

Q. And if you lowered it to 25 percent in Alabama, 75 percent outside, it would lower it still two to one to the detriment of the foreign corporations; is that correct?

A. That's correct.

Q. And that is a comparison of foreign franchise tax solely versus a combined tax burden of the domestic shares tax and the domestic franchise tax; is that correct?

A. That's correct.

Q. In that study did you not use what we call the "as if" foreign corporation approach whereby you took a domestic corporation and took that same corporation and assumed it to be taxed under the foreign statute?

A. Yes.

Q. And that would be the exact same corporation, would it not?

[54] A. Yes.

Q. The exact same size?

A. Yes.

Q. The exact corporate makeup?

A. Yes.

Q. And in all respects it is the identical corporation?

A. Yes.

Q. It would be, if I may, a comparison is if you found a foreign that was identical to the domestic and

taxed one under the domestic law and the other one under the foreign law; is that correct?

A. That's correct.

* * * *

[55] [Q.] Now, in 1988 did you perform another study or studies?

A. Yes.

Q. And what was this in connection with?

A. An attempt to—another attempt to place the two taxes on an equal footing. The two taxes meaning foreign and domestic franchise taxes. This was done in conjunction with the special legislative session. I believe that was in 1989.

Q. Okay.

A. You said '88.

Q. Forgive me. I will amend it. It was either '88 or '89.

A. You meant the '89 special session?

Q. Yes.

A. That was in 1989, I believe.

Q. All right. It was during the first year of the Hunt administration, was it not or was it?

[56] A. I'm not sure.

Q. Wasn't Mr. Sizemore the Director or Commissioner of Revenue?

A. Wait. I'm confused.

Q. May not be. I'm trying to relate it to time.

A. The Supreme Court ruled on the question, I believe it was, in December 1989. We were in the—the legislature was in session when the Court ruled. And I believe that was in 1989, if that's the period that you are referring to.

Q. Okay. All right. In connection with that session of the legislature, did not the Department send out a questionnaire to the franchise taxpayers, both foreign and domestic, and the domestic franchise taxpayers, as well as

other taxes, seeking their advice and what they really wanted in the taxes?

A. Yes, sir. That was something that was conducted by the Commissioner of Revenue.

* * * *

[58] Q. And I will ask you if Plaintiff's Exhibit 11 is not more information that is accumulated there in that spreadsheet which was Exhibit 9, and there you would pick up the unallocated capital, the allocation percentage or factor and the actual amount of domestic franchise tax paid, permit fee paid, and license and permit fee paid for each of those ninety-nine corporations; is that correct?

A. That appears to be the case. Now, it would not be the same—it would not be for the exact same worksheet because the columns are going to be different. But it was not necessarily from the same worksheet but part of the same [59] study, yes.

Q. But it's the same corporations by number, and it is then assembled later on Plaintiff's Exhibit 9, putting the two together; is that correct?

A. Yes, it is part of the—the corporations would be the same.

Q. All right. I will show you Plaintiff's Exhibit 12 which says those same corporations and says the allocation percentages. Were those the actual allocation percentages determined for each of the ninety-nine sample corporations?

You will note they are still numbered 301 through whatever the final number is.

A. Yes.

THE COURT: Mr. Broadhead, which of the studies are we talking about, 1983 or 1989?

THE WITNESS: These are all 1989, Judge Gordon.

THE COURT: Thank you.

Q. I will show you Plaintiff's Exhibit 13 which is a recap of the figures, I believe, that are contained in each of those foregoing Exhibits 9, 10, 11 and 12. I didn't

say you prepared that. But do you see that to be a recap of all of those saying the capital stock par value, your unallocated, the allocation percentages, those same factors? And you can check them to see that they—

A. There is—let me explain something. We developed a base [60] using the same corporations. Then we tried various and sundry different approaches and different proposals. When you ask do all of these particular spreadsheets, do they all tie together exactly, I cannot confirm that. I can say it comes from the same study. There is—it could have been that some of these segments could have been from house bill 16 or house bill 14 or house bill 12 where we used the same base to do—set up different "what if" analysis. And I wanted to clarify that before we get too—

Q. Right. But they are the same corporations? All the numbers are the same?

A. Yes, sir. All the same corporations as long as they have the same number. Because we numbered all of the corporations and kept the identity of that particular corporation secret.

Q. So the identity contained on each of those exhibits, same numbers, those are the same corporations?

A. That's correct, yes.

Q. Does this appear, and this being Plaintiff's Exhibit 13, appear to be a spreadsheet that uses those same corporations subject to your verification of the numbers?

A. Yes, sir.

Q. Their same par values, their same unallocated capital employed and their allocation percentages for the capital?

A. Yes, sir.

[61] Q. And the calculation of franchise permits, shares tax, license and permit and a total tax column for the domestic corporation?

A. Yes.

Q. Does it then contain an "as if" foreign calculation for those same corporations using that allocation factor?

A. Yes.

Q. And if you would, look on the final page of all these ninety-nine that were in your sample and tell us what the total franchise tax would be for all ninety-nine corporations as a domestic corporation?

A. $61,147.00.

Q. And the total amount of shares taxed for those same corporations?

A. $284,630.00.

Q. What is the amount of the "as if" franchise tax calculated for those same corporations, "as if" foreign that is?

A. $7,690,108.00.

Q. And what is the difference in the amount of tax they would have paid as "as if" foreign corporations and domestic corporations?

A. $7,344,331.00.

Q. Would you assume this? Does it look to you, and I know you don't have a calculator, that that's about twenty-two to one?

[62] A. Yes.

Q. The foreigns paid twenty-two times as much tax as the combined domestic franchise and shares tax?

A. Yes.

Q. And this was on the basis of "as if" foreign calculations on the same domestic corporations?

A. That's correct.

* * * *

[80] Q. Very well. Can a domestic corporation at the time of incorporation in Alabama minimize its domestic franchise tax by having a par value that would place it under the level of five thousand dollars?

A. Yes, sir.

Q. Later after it is incorporated, if it is incorporated for more money than that, can it amend at its own whim,

so to speak, its own decision to decrease the amount of par value of its capital stock to one cent if it so desires?

A. Yes.

Q. And would that minimize its domestic franchise tax to the very minimum of fifty dollars in Alabama?

A. Yes, sir.

Q. Can a foreign corporation by manipulation of its own capital structure in any way reduce the amount of its foreign franchise tax?

A. Not by manipulation of its capital structure except through investments, whatever. There are some possibilities.

[81] Q. Okay. With regard to that, and I don't know what you're talking about, can it invest in government securities and reduce its franchise tax?

A. If it invests in industrial development bonds, it can get an exclusion.

Q. That is a specific exclusion within the statute?

A. Yes.

Q. But that would require that it make a particular investment in Alabama industrial development bonds; is that not correct?

A. That's correct.

Q. Any other way you know of that it can minimize at all its tax or reduce its tax by manipulation?

A. There are the investment areas investing in, for instance, a subsidiary corporation that's operating exclusively outside the state of Alabama would be—there again, this is a way to reduce the franchise tax base.

Q. What is that? By incorporating a subsidiary in Alabama; is that what you are saying?

A. If a corporation owns a subsidiary that's operating exclusively outside of Alabama, then that would be an exclusion from the tax base. There are a number of exclusions from the tax base. I'm not sure that I'm—

Q. That would be just property not devoted or utilized or used in Alabama or employed in Alabama by

the—if it were [82] invested outside of Alabama, then it could not be capital employed in Alabama, could it?

A. That's right.

Q. So whether it is invested another corporation or one of its own subsidiaries, if it is invested out of Alabama, it is not capital employed in this state?

A. If you are asking can they play around with the par value of the stock and impact the franchise tax, no, they cannot.

Q. They can't play around with their stock at all, whether it be par value, and influence the franchise tax?

A. That's correct, yes.

* * * *

[84] Q. All right. Have you ever conducted or performed a study whereby you compared the domestic franchise tax burden of domestic corporations in Alabama and the foreign franchise tax burdens of either those same domestic corporations calculated "as if" foreign or foreign corporations that would indicate that the franchise tax burden of the domestic [85] corporation was less than the franchise tax burden of the foreign corporation?

A. On an "as if" foreign. I have seen numerous instances, Mr. Byars, where if you—

Q. Study is my key word as opposed to an individual calculation.

A. No. Okay. No.

Q. All right. There are some instances where a domestic would pay less tax as an "as if" foreign corporation?

A. Yes.

Q. But as a study where you drew a sample, you have never seen it where the sample would indicate that domestic corporations pay less than foreign corporations in franchise taxes?

A. If you use the—if you use the foreign franchise tax procedure.

Q. Correct. Okay.

A. I can't remember that occurring.

* * * *

[86] CROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, can a foreign corporation manipulate its franchise tax liability by setting up Alabama subsidiaries?

A. Yes.

Q. And does that occur in the real world?

A. Yes, it does.

Q. And you have run into that quite often in your administration with the franchise tax?

A. Yes.

* * * *

[88] Q. Okay. I will show you State's Exhibit Number 1. Is this that study?

A. Yes.

Q. Was that study prepared under your supervision and at your direction?

A. Yes.

Q. Would you tell the Court what data that study was based on?

A. All of the information that went into this study came from foreign franchise tax returns filed by the taxpayers.

Q. All right. And so all the information that was used in that study was provided to the Department by the taxpayers themselves?

A. That's correct.

Q. Generally speaking, what did that study show?

A. That if these corporations had been filing as domestic corporations, they would have paid drastically more taxes to [89] the State of Alabama.

Q. Mr. Broadhead, I direct your attention to page 1 of the study where it lists BellSouth Telecommunications.

A. Okay.

Q. Would you tell the Court, please, how much BellSouth Telecommunications paid in foreign franchise taxes in the year 1991?

A. Twenty-five dollars.

Q. And what did your study show they would have paid had they been a domestic corporation?

A. $42,946,058.00.

Q. All right. Take the year '92. What did the BellSouth Telecommunications, Inc., pay in foreign franchise taxes?

A. $6,371,607.00.

Q. What would they have paid had they been domestic corporations?

A. $73,189,591.00.

Q. All right. That's a difference of how much?

A. $66,817,984.00.

Q. So they would have paid 66 million dollars more if they had been domestic corporations than they have actually paid?

A. That's correct.

Q. Let's go down and take BellSouth Corporation, another named plaintiff. In the year 1986 what did that corporation pay in foreign franchise taxes?

[90] A. Twenty-five dollars.

Q. And what would they have paid had they been a foreign—had they been paying as a domestic corporation in domestic franchise taxes?

A. $3,097,780.00.

Q. How much shares tax would they have paid?

A. $5,307,201.00.

Q. So the total domestic corporation tax they would have paid would have been what?

A. $8,404,981.00.

Q. So 8.4 million instead of $25.00?

A. Can I round these million-dollar numbers off or do you want them exact?

Q. You can round them off as far as I'm concerned if it is all right with Mr. Byars.

MR. BYARS: Sure, no problem.

A. It will save some time.

Q. And these numbers pretty much go through right on for the next few years for BellSouth Corporation?

A. Yes, sir. The highest—

Q. Go ahead.

A. The highest amount paid by BellSouth Corporation for foreign franchise tax was $5,300.00 in 1992, in which case—in which year they would have paid domestic franchise tax of 4.8 million, domestic shares tax of 24.3 million, for a [91] total domestic tax of 29.2 million for a difference of 29.1 million that they would have paid in addition to what they did pay had they been a domestic corporation.

Q. Okay. Your study included figures for that corporation from 1986 through 1992; is that correct?

A. Yes, sir.

Q. What's the total difference that—more that they would have paid had they been domestic over and above what they actually paid as a foreign corporation?

A. 513.4 million.

Q. Let's go to the next one on the list here. South Central Bell Telephone Company, there are figures here for 1986. What would South Central Bell have paid in foreign—I mean, what did they pay in foreign franchise taxes?

A. 4.9 million.

Q. What would they have paid had they been filing as a domestic corporation?

A. They would have paid 29.3 million.

Q. All right. Take 1987, what did they pay?

A. 4.9—actually it would round to five million.

Q. All right. What would they have paid in domestic tax had they been filing as a domestic corporation?

A. Twenty-nine and a half million.

Q. Do those figures pretty much hold true all the way up through 1991?

[92] A. Yes, through 1991.

Q. From 1986 through '92, what's the total difference?
A. 148.1 million.
Q. That's 148.1 million dollars more that they would have paid as domestics than they actually paid as foreigns?
A. Yes, sir.
Q. All right. Take BellSouth Services, Inc., what did they actually pay in foreign franchise taxes in 1986?
A. $30,950.00.
Q. What would they have paid had they been filing as domestic?
A. $340,000.00.
Q. All right. Go on to BellSouth Financial Services, take the year 1990, let's say, what did they actually pay?
A. $16,908.00.
Q. What would they have paid as a domestic corporation?
A. $39,700.00.
Q. For a total difference of 22.7?
A. Yes.
Q. All right. What's the total? You have got 1986 through 1992 listed compared here for them. What was the total if you added all those years up? What did they pay in actual foreign corporation franchise taxes.
A. $193,028.00.
Q. What would they have paid had they been filing as domestic corporations?
[93] A. $334,965.00.
Q. And that means that they would have paid, if they were domestics, $141,937.00 more?
A. Yes.
Q. Is that right?
A. Yes.
Q. Let's take a look at BellSouth Advertising and Publishing Company, another of the BellSouth Companies. In the year 1986 what was their franchise tax payment to the State?
A. $60,038.00.

Q. And according to your computations, what would they have paid had they been filing as a domestic corporation?
A. Four point two million.
Q. And that 4.2 million includes the franchise and shares tax; is that right?
A. Yes.
Q. What would just the franchise tax have been?
A. One point eight million.
Q. All right. Let's go to the total for this company again. How much in total foreign corporation franchise taxes did they pay for the year 1986 through '92?
A. $445,316.00.
Q. What would this company have paid if they had been filing as a domestic company?
A. Twenty-four million dollars.
[94] Q. All right. BellSouth Resources, Inc., is another one. Go to the total. They evidently had no figures for '86, '87 and '88. Go to the total column for the years '89 through '92. What did they actually pay?
A. $7,608.00.
Q. What would they have paid as a domestic corporation?
A. Eighty-six point eight thousand dollars.
Q. Okay. For a total difference of $79,280.00?
A. That's correct.
Q. BellSouth Products, Inc. Let's go to the total on them. What did they actually pay?
A. $3,172.00.
Q. And what would they have paid as a domestic?
A. For the entire period they would have paid $100.00.
Q. You only computed the years '91 and '92 for this company, though, right?
A. That's correct, yes.
Q. So that's the only one so far that we have seen where the totals would be less as a foreign—more as a foreign than as a domestic?
A. They would have paid less as a domestic.

Q. By about three thousand dollars?
A. Yes.
Q. Go to Alabama Cellular Services, Inc. The total for them—what was their total foreign tax?
[95] A. $304,268.00.
Q. And what would they have paid as a domestic?
A. $265,028.00.
Q. All right. This is for the years 1986 through '92?
A. Yes.
Q. So they would have paid $39,000.00 less as a domestic?
A. Less as a domestic, yes.
Q. How about Sunlink Corporation? You computed figures for them for '86 through '92 also.
A. Yes.
Q. How much did they pay in total foreign corporation franchise taxes?
A. Total payment was $108,000.00.
Q. What would they have paid as domestics?
A. $169,000.00.
Q. So they would have paid as a domestic about $60,000.00 more in taxes; is that correct?
A. Yes, they would have paid more as a domestic.
Q. Let's go to TechSouth, Inc. You had figures that you computed for 1986 through 1992 for that corporation also?
A. Yes.
Q. What was the total amount of foreign corporation franchise taxes they paid for that period of time?
A. $22,974.00.
Q. And what would they have paid in domestic taxes?
[96] A. $47,733.00.
Q. And what's the difference?
A. They would have owed more by about $25,000.00 had they been domestic.
Q. All right. CSX Transportation, Inc., another named plaintiff, did you compute the figures for them as if domestic 1986 through 1992 also?
A. Yes.

Q. Let's just go to the total on them also. What did they pay in foreign corporation franchise taxes for that period.
A. Three point nine million.
Q. What would they have paid had they been filing as domestic corporations in Alabama?
A. Fourteen point one million. I'm sorry. That's correct, yes, sir.
Q. All these figures were taken from franchise tax returns that these taxes were filed with the Department; is that correct?
A. That's correct.

* * * *

[96] REDIRECT EXAMINATION
OF ERNEST BROADHEAD

[97] Q. Mr. Broadhead, are all of the Bell Companies Georgia corporations or do you know?
A. I just know they are foreign.
Q. Well, if I represent to you that they are all Georgia corporations and that Georgia has a par value statute that says it will be one cent per share, would all of your domestic franchise tax calculations be incorrect?
A. I don't—no, I wouldn't agree to that.
Q. What if it is one cent par value, and you have one share? What is the tax? I asked you that earlier.
A. If the par value is actually one cent?
Q. Yeah.
A. Then, yes, I would have to assume that the numbers that were recorded on these returns are wrong, and we used incorrect information.

* * * *

[106] RECROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, is there a line on the Schedule "A" of the Alabama franchise tax return on which a corporation is allowed to put the value of its common and preferred stock? Is that line 14? Turn to page 2.

A. Yes. Yes, I have got you now.

Q. And did you base your figures on your study on what the plaintiffs in this case listed in that line as their value of their common preferred stock?

A. Yes.

MR. BOWDEN: That's all, Your Honor.

FURTHER REDIRECT EXAMINATION
OF ERNEST BROADHEAD

[107] Q. That figure that is put on there is the book value, is it not, as opposed to the par value? I didn't hear your answer.

A. Oh, was that a question?

Q. Yes. That's book value rather than par value?

A. I don't know what it is. It is just a number on a tax return filed by the taxpayer, Mr. Byars. I don't know.

Q. What does the item say?

A. Pardon?

Q. Is it in the balance sheet?

A. Yes, sir.

Q. In the balance sheet you normally give the book value of your stock, do you not?

A. Yes, sir.

* * * *

[129] DIRECT EXAMINATION
OF ADELE HOWELL SHEPHERD

* * * *

[132] Q. Ms. Shepherd are you aware of the operations of the BeliSouth Companies that are parties to this?

A. I am.

Q. Are you also aware of the Alabama franchise tax returns of all the BellSouth taxpayers who are litigants in this litigation?

[133] A. I am.

Q. And with respect to each of these companies, where are they incorporated or where is it incorporated?

A. Each of the companies that's a party to this litigation is incorporated in Georgia. It's qualified to do business in Alabama and operate in interstate commerce.

Q. All right. I'm going to name them by name as we go now. We have said that generically. But with regard to each of these, would you describe the capital structure of the corporations?

A. I will.

Q. All right. With BellSouth Products?

A. BellSouth Products has one common share authorized, one common share issued. It has a stated value at $500.00.

Q. No-par stock?

A. No-par stock.

Q. BellSouth Resources?

A. BellSouth Resources has one common share authorized, one common share issued, no-par stock. It has a stated value of $500.00.

Q. Alabama Cellular?

A. Alabama Cellular has one share common authorized, one share common issued, no-par stock with a stated value of $500.00.

Q. Sunlink?

A. Sunlink has 1,000 shares common authorized, one share [134] issued. It is non-par stock. It has a stated value of $500.00.

Q. BellSouth Advertising and Publishing Corporation?

A. BellSouth Advertising and Publishing Corporation has 1,000 shares common authorized, 913 shares issued. It has a no-par stock. For Alabama franchise tax purposes, it would have one penny par.

Q. All right. What would the total par value be of all the shares of stock?

A. $9.13.

Q. What about BellSouth Financial Services?

A. BellSouth Financial Services has 1,000 shares common authorized, one share issued. It has a stated value of $500.00. It is a no-par stock.

Q. What about TechSouth?

A. TechSouth has 100,000 shares common authorized, 98,000 shares issued. It has no stated value. For Alabama franchise tax purposes, each share has a penny value par.

Q. What's the total par value of that?

A. $980.00.

Q. How about BellSouth Services?

A. BellSouth Services had two shares of common authorized, two shares issued. It was no-par value stock. It has a stated value of $500.00.

Q. BellSouth Telecommunications?

[135] A. BellSouth Telecommunications has one common share authorized, one common share issued. It has no stated value. For Alabama franchise tax purposes, the par value is one penny.

Q. With regard to South Central Bell, which was its predecessor, what was its capital structure as long as it was a separate corporation?

A. It has one share common authorized, one share common issued. It had no stated value. For Alabama franchise tax purposes, that one share had par value of one penny.

Q. With regard to each of these that you have talked about, what would have been the Alabama domestic franchise tax if it had been taxed as a domestic?

A. Fifty dollars.

Q. Each?

A. Each.

Q. What was the BellSouth Corporation's financials?

A. BellSouth Corporation has 1.1 billion shares authorized, 498 million shares outstanding, and it has a par value of one dollar.

Q. If it were incorporated as a domestic in Alabama, would it have the option of lowering that par value to one cent or even less?

A. It would.

* * * *

[161] CROSS-EXAMINATION
OF ADELE HOWELL SHEPHERD

* * * *

[163] Q. Which of the BellSouth Companies are publics that traded, Ms. Shepherd?

A. BellSouth Corporation.

[164] Q. Is that the only one?

A. That is the only one.

Q. Okay. And what did you state was—I believe you stated that there were 498 million shares?

A. Outstanding.

Q. At a par value of a dollar a share?

A. That's correct.

Q. Do you know what the outstanding shares of South Central Bell Telephone Company are?

A. South Central Bell Company was merged with BellSouth Telecommunications 12-31-91. Do you want the 12-31-91 number before merger or do you want the CSXT number?

Q. Give me the combined number for BellSouth Telecommunications.

A. BellSouth Telecommunications has one common share authorized, one common share issued. For Alabama franchise tax purposes that one share has par value of a penny.

Q. What do you base your statement that it has a par value of a penny on?

A. Georgia is a no-par state. All of these corporations are incorporated in Georgia. The Georgia corporation law has a provision, which Mr. Byars referenced earlier, that says—that addresses what the par value is for tax purposes if one is needed for no-par stock for Georgia corporations.

Q. All right.

[165] A. Would you like for me to read it?

Q. No, that won't be necessary. Do you know whether Alabama has that same provision in its law?

A. Georgia corporations, I would think, would be governed by Georgia corporation law. I'm not familiar—

Q. That wasn't my question. I'm sorry.

A. I don't know about the Alabama corporation law.

Q. Okay. If BellSouth Telecommunications was incorporated in Alabama, assuming Alabama didn't have that provision in its law, then no such provision would apply, would it?

A. If BellSouth Telecommunications were incorporated in Alabama, it would be incorporated with a low-par value, and it wouldn't need that provision.

MR. BOWDEN: Well, let me have a copy of BellSouth Telecommunications.

MR. BYARS: You meant BellSouth Corporation?

THE WITNESS: No, he is asking about Telecommunications.

Q. Ms. Shepherd, I'm holding in my hand a copy of the Alabama foreign corporation franchise tax filed by BellSouth Telecommunications for 1992. Did you prepare this?

A. I did not.

Q. Would you take a look at that? And if I represent to you that's the original, would you dispute that?

A. I don't think I dispute it. It looks original to me.

[166] Q. On page 3 under franchise tax and permit fee computation, there is a line one that says outstanding capital stock. Would you read that number for me—for the Court, please?

A. It's $7,318,959,147.00.

Q. All right. Awhile ago you stated that there was one share with a par value of what?

A. One penny.

Q. All right. And that's based on Georgia law.

A. That's based on Georgia corporation law.

Q. But when you reported this outstanding capital stock to Alabama on your foreign return, you reported $7,318,959,147.00. of outstanding capital stock; is that correct?

A. That's what we reported in the capital stock account.

Q. All right. You have stated before that you have in the past prepared foreign corporation franchise tax returns for Alabama; is that correct?

A. That's correct.

Q. Are you not aware that this line that you have just read from is the line on which you're suppose to report the par value of your stock?

A. There is no instruction on that line that says par value. We would report on that line what is in our capital stock account on our books.

Q. All right. Is that—what would that represent?

[167] A. That would represent what was in the capital stock account on the books.

Q. What does the capital stock account on the books represent? Is that the stated value of your stock?

A. It is not stated value because there is no stated value.

Q. Is it market value?

A. It is not market value.

Q. Well, it is a number, and it is 7.3 billion. I mean, it's something besides a penny, is it not?

A. It is not a penny, but it is also not par value. And it is not stated value.

THE COURT: What is it?

THE WITNESS: It is what's in the capital account on the books of the corporation.

THE COURT: How does that—How do you figure that? I don't mean—What's your accounting procedures? What's that reflective of in terms of accounting?

THE WITNESS: I'm not sure I can answer that question. I can answer what it is not. I'm not sure I can answer what it is.

THE COURT: Can you answer how they arrived at that figure?

THE WITNESS: Not in a way that I think would help the Court.

THE COURT: Okay.

[168] Q. Would you disagree that if I told you that the Department of Revenue considers this line to be the place to put par value of your outstanding shares?

A. I would not. But I would also say that we would put what's in our capital account there and not the par value. But I expect in the future we will change our procedures.

Q. But you're stating that you're basing the par value on a provision of Georgia law that provides that in certain circumstances the par value will be a penny regardless of the actual market value of your stock?

A. Because Georgia is a no-par state, it contains a provision that says when a par is needed for tax purposes the deemed par value is one penny per share.

Q. All right. Is that the basis of your former statements regarding the other companies and the fact that they have one cent par value stock and one share of stock issued that's based on the Georgia law; is that not right?

A. That's correct.

* * * *

[174] RECROSS-EXAMINATION
OF ADELE HOWELL SHEPHERD

Q. Your testimony about the "as if" domestics was predicated on the fact that these domestics would be subject to this Georgia law provision that provides for the one penny par value; is that not correct?

A. They are Georgia domestic corporations currently, and the calculation there was "as if" domestic using their current capital structure in the Georgia law.

* * * *

[195] CROSS-EXAMINATION
OF JAMES D. HANFORD

* * * *

[197] Q. Did you not calculate or try to determine whether or not this study was accurate?

A. Yes.

Q. Do you have any reason to believe it is not accurate?

A. Well, I wasn't able to verify the domestic franchise tax liability that's displayed in the study.

Q. Do you not have in your possession foreign corporation franchise tax returns filed by CSX?

A. Yes.

Q. Did you not hear Mr. Broadhead state earlier that that is the information that was pulled from that in order to perform this study?

A. Yes.

Q. All right. Then you did have the information you needed to calculate or verify the accuracy of this study, did you not?

A. Well—

Q. You had all the information Mr. Broadhead had, did you not?

A. I believe so.

Q. All right. Then do you have any reason to believe or do you find or do you conclude that that study is inaccurate?

A. What I heard yesterday was that in order for CSX Transportation to have a domestic corporation franchise tax liability, they would have to be incorporated in the state [198] of Alabama.

Q. That's correct.

A. We are not incorporated in the state of Alabama.

Q. I understand that. Did not someone ask you to check that study and see if you could find whether or not there were any inaccuracies in it with regard to your company?

A. Yes, sir.

Q. All right. Did you find any inaccuracies with regard to your company?

A. I was able to verify that the foreign franchise tax liability as paid was an accurate amount for each of the years and in total.

Q. Did you find any inaccuracies in the study?

A. Well, I was unable to verify the domestic corporation franchise tax liability.

Q. You don't know how to compute a domestic franchise tax liability?

A. No, sir. I do know how to compute it.

Q. Did you make an attempt to compute it based on the information in that foreign corporation franchise tax return?

A. Yes, I did.

Q. All right. And what was the result of that? Did you come up with figures that were different from what Mr. Broadhead came up with?

[199] A. No. If the assumption was made that CSX Transportation were a domestic corporation in Alabama and our existing capital structure remained the same,

then the line that is entitled domestic corporation "as if" franchise tax would have been accurate.

* * * *

[199] REDIRECT EXAMINATION
OF JAMES D. HANFORD

BY MR. BYARS:

Q. If CSXT were to incorporate in Alabama, would it incorporate under its present capital structure with regard to par value?

A. No, it would not. Part of my job is planning for franchise taxes and one of the planning ideas that I would definitely propose is that if we were to incorporate CSX Transportation in Alabama, we would incorporate them with penny par value stock in Alabama.

* * * *

[204] CROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, I would like to return to State's Exhibit 1 for a minute if I may. Attached to this, which is the study done by the Department of Revenue under your direction, according to this return and according to this study, you took the total value of all shares of stock from the liability side of Schedule A. Where is that on this franchise tax return?

A. That's on the Schedule A on lines 14.

Q. That's for preferred stock and common stock?

A. And common stock. Now, in some cases in some instances [205] there may have been a separate balance sheet attached.

Q. Uh-huh.

A. In lieu of the taxpayer having completed this Schedule A on the return. And the par value of the stock was taken from the balance sheet in that case.

Q. Okay. With regard to the BellSouth Company and CSX Company, did you utilize that line on the return that they have filed to come up with a figure for their—the value of their stock?

A. We used the par value of the stock, the capital stock.

Q Okay. As it was listed on the return?

A. As it was listed on the return as reported by the taxpayer.

Q. What would be reported on Schedule E line 1, which is on page 3?

A. That would be outstanding capital stock at par value.

Q. And what is the difference between Schedule E line 1 and Schedule B—I mean Schedule A?

A. Line 14?

Q. Line 14.

A. That would be the capital stock less treasury stock that had been repurchased. It would not be outstanding. It would be issued but not outstanding.

Q. So you don't use treasury stock in computing the domestic franchise tax?

A. Yes, we use—in computing domestic franchise tax, we do [206] include treasury stock. It is not included in computing foreign franchise tax.

Q. Okay. So the foreign corporation return would not include it on Schedule A line 14 then?

A. Yes, Schedule A line 14 would include the issued capital stock at par value. But in computing the foreign franchise tax, you remove treasury stock from that figure. You do not remove the treasury stock in computing domestic franchise tax.

Q. All right.

A. So—

Q. Return to Schedule E line 2, what is that?

A. Schedule E? Surplus and undivided profits. That would consist of retained earnings, capital surplus of that amount that was paid for the stock in excess of par.

Q. All right. Why did you use Schedule A line 14 in computing the value of the stock in your study?

A. Because that was the issued capital stock at par value shown on line 14 which included treasury stock. There is no exclusion for treasury stock from the amount that's used to compute domestic franchise tax.

Q. And the par value of par stock on the book value of no-par stock is the second figure you would expect to find in Schedule A line 14?

A. Would you repeat that, please?

[207] Q. The par value of par stock or the book value of no-par stock is the figure you would expect to find on that line?

A. No.

Q. What would you expect to find?

A. It would be the par value of the stock or the stated value of the stock, not the book value.

* * * *

[209] RECROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, I have a certified copy of the foreign corporation franchise tax return for BellSouth Telecommunications for 1992. On Schedule E line 1, would you read that figure, please?

A. $7,318—Excuse me, $7,318,959,147.00.

Q. All right. And that is—what is that line designated?

A. Outstanding capital stock.

Q. All right. And that figure of $7 billion, is that not correct?

A. That's correct.

Q. And what would you expect that figure to represent, you [210] being a franchise tax administrator with experience in this area?

A. That would represent the par value of their outstanding capital stock or the par value of their stock less treasury stock.

Q. All right. And if they were no-par, what would it be?

A. It would be zero or the stated value.

Q. If there is a stated value?

A. If there is a stated value, yes.

* * * *

[210] MR. BYARS: Your Honor, this is the testimony of Wayne White, CPA. And here's Your Honor's copy.

* * * *

[213] Q. In the practice of your profession, have you had an opportunity to represent and advise corporations concerning Alabama franchise tax liability? If so, what observations do you have?

A. Yes. In the practice of my profession, I have had the opportunity to represent and advise many corporations concerning Alabama franchise tax liability, both prior to incorporation and after incorporation.

Based on my observations, and in some cases, my advice, most newly incorporated Alabama domestic corporations that I have worked with have utilized a minimal arbitrary "par value" to minimize domestic franchise tax liability. In fact, the first time I heard of using "penny stock" for domestic Alabama franchise tax minimization was in a telephone conversation with a representative of the Alabama Department of Revenue.

Likewise, existing corporations have been advised by me to change and many have changed the par value of their capital stock to minimize domestic franchise tax liability.

Foreign corporations have been advised to and have incorporated under Alabama law to a wholly owned domestic [214] subsidiary with a minimal par value to minimize the total franchise tax liability.

Utilizing this strategy, the domestic subsidiary may have limited its domestic franchise tax burden to the mini-

mum amount (or a substantially decreased amount), while the parent foreign corporation is provided an exclusion from its tax base of the actual amount of its investment in the capital of other corporations organized under the Alabama laws. Thus, the Alabama franchise tax scheme provides tax incentives, which often result in discrimination in favor of those corporations incorporating under Alabama laws as compared to similar foreign corporations doing business in Alabama, solely on the basis of the state of incorporation.

* * * *

[267] RECROSS-EXAMINATION
OF LARRY RICHARDS

* * * *

Q. Did you ever take a look at any foreign corporations with a view to computing what they would have paid as domestic corporations?

A. My recollection is that some very preliminary thought was given to working it both ways. As I recall, the data necessary to make this computation; i.e., the par value of the capital stock, was not readily available for the foreign corporations. And it would have been extremely difficult to carry on that operation. So that avenue was abandoned [268] realizing that that was not a necessary thing to do, given that we could treat the domestic corporations "as if" foreign.

Q. Did you do any preliminary studies along those lines of computing the foreign corporations "as if" domestic?

A. I did not.

* * * *

[294] CROSS-EXAMINATION
OF ERNEST BROADHEAD

Q. Mr. Broadhead, with regard to all of the studies that were done under your direction relating to franchise

taxes, when [295] you calculated on the basis of the foreign franchise tax, is it a fact that you used the property factor as the sole factor in making that presentation?

A. Yes.

* * * *

January 14, 1997

THE COURT OF CIVIL APPEALS
OF ALABAMA

RE: 2960353

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE
(Appeal from Montgomery County Circuit Court:
CV 89-2600, CV 90-1591, CV 90-1711, CV 91-397,
CV 91-1079, CV 90-2555-2558, CV 91-2151)

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Appellants' motion to transfer joint appeal to the Supreme Court of Alabama is granted.

/s/ John H. Wilkerson, Jr.
JOHN H. WILKERSON, JR.
Clerk
Court of Civil Appeals

[Pl. Trial Exh. 1]

A Study of the Differences in the Franchise Tax Liability for Foreign vs. Domestic Corporations

Alabama
1988-1991

by

Larry E. Richards Ph.D.

The objective of this study was to determine whether the Alabama Franchise Tax scheme was discriminatory between domestic and foreign corporations prior to 1992. Although primary emphasis of this study is on the time period 1988 through 1991, conclusions may be applicable to the earlier period (1981 through 1987). The fact that Alabama by statute, facially or as applied, has different franchise tax bases and rates for domestic [1] vs. foreign corporations [2] creates differential treatment and the potential for discriminatory treatment of the two classes of corporations based solely on their state of incorporation. Domestic franchise tax is calculated on the tax base (par-value of capital stock) that at the time of incorporation is not necessarily related to corporate value, and that after the commencement of operations is not related to corporate value, while the foreign franchise tax is calculated upon a tax base (capital actually employed in Alabama) which is directly related to corporate value. These differences imposed by statute necessarily result in differential treatment which facially or as applied may result in discrimination between domestic and foreign corporations.

This underlying research was commenced by taking a statistically valid stratified random sample of Alabama domestic corporations. Domestic corporations were randomly selected from each of 7 strata which were based upon the ratio of corporate net worth to par-value. The sampled corporations were then treated as if they were foreign corporations and subjected to the franchise tax calculation under section 40-14-41.

The conclusion of this study is that the Alabama Franchise Tax statutes as applied have in fact resulted in

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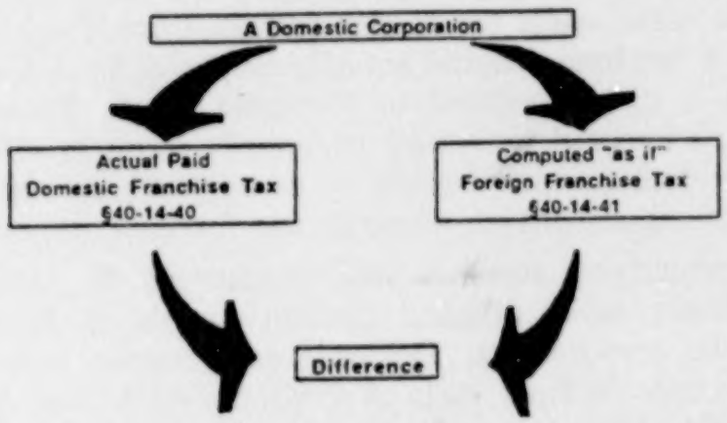
[1] Ala. Code 1975, § 40-14-40 ("Based on its capital stock" at the rate of $10 on each $1,000 of capital stock.) As applied by the Alabama Department of Revenue, the "capital stock" has been determined to mean "par-value of the capital stock," and applied as the tax base for domestic corporations.

[2] Ala. Code 1975, § 40-14-41 ("$3.00 on each $1,000.00 of the actual amount of its capital employed in this state.")

discrimination in favor of domestic corporations. Discrimination was determined by comparing the domestic franchise tax paid by the sampled corporations under section 40-14-40 with the foreign franchise tax liability calculated under 40-14-41 by treating the sample domestic corporations as if they were foreign corporations. The "as if foreign" franchise tax was computed for each sampled domestic corporation and the difference was determined between what each actually paid as a domestic corporation and what each would have paid had it been a foreign corporation. Figure 1 gives a graphic overview of the procedure employed in this investigation.

Figure 1



Conservatively calculated, the level of discrimination in favor of the more than 40,000 Alabama domestic corporations by years is as follows:

Year	Discrimination per Corporation	Average Domestic Franchise Tax	Average "As if Foreign" Franchise Tax	Percentage Discrimination	Discrimination Total
1988	$950.63	$231.22	$1181.85	411.14%	$39,027,183
1989	$972.14	$228.47	$1200.61	425.50%	$41,805,054
1990	$969.92	$225.05	$1194.97	430.98%	$42,996,440
1991	$1046.09	$205.46	$1251.55	509.15%	$46,333,602

For example, in 1988, the sample evidence demonstrates that the average increase in franchise tax per domestic corporation had the domestic corporation been subject to the same franchise tax base and rate as the foreign corporations (§ 40-14-41) would have been $950.63. And, the discrimination as a percent of the paid domestic franchise tax would be 411.14 percent. This population of Alabama domestic corporations paid $39,027,183 less in Alabama franchise tax than they would have had they been treated as foreign corporations.

Introduction

Discrimination would exist if the application of the franchise tax statute for domestic corporations consistently leads to franchise tax liability at a different (lower) level (magnitude) than the franchise tax liability produced by the application of the franchise tax statute for foreign corporations. If so, those domestic corporations taxed under section 40-14-40 that are paying franchise tax at a lower tax level than foreign corporations taxed under section 40-14-41 would be given discriminatorily preferential treatment. By applying the two different franchise tax bases and rates to each of the sampled domestic corporations, where the size and structure of each corporation remains constant, with one franchise tax calculation made pursuant to the domestic statute and the other calculation made pursuant to the foreign statute, the clear view of the true differences between the tax as imposed under the domestic statute as compared to tax imposed under the foreign statute becomes obvious. This is the approach taken in this research. Since the two groups (domestic vs. foreign) may have different financial structures and sizes, merely examining the average franchise tax for domestic vs. foreign corporations might not necessarily allow the detection of discrimination. However, when the same corporations are involved and it is the

difference in franchise tax that is measured, the size and structure are identical, the distinction made in White v. Reynolds, 558 So.2d 373, 384-86, 388-89 (Ala. 1989) is thereby removed.

A sample of domestic corporations was drawn in order to estimate the true mean difference in franchise tax. The results were used to test the hypotheses about the true mean differences (1988-1991). If the franchise tax statutes as applied do not lead to discrimination, the true mean differences ("as if foreign" tax minus domestic tax) would be zero; in other words, if there is no discrimination, the average difference would be zero.[3] If the average corporate franchise tax calculated by applying the foreign franchise tax base and rate is different from (higher than) the average corporate franchise tax calculated by applying the domestic franchise base and rate, there is discrimination in favor of domestic corporations. Therefore, if the statistical results lead to the rejection of the hypothesis that the true mean difference is zero, discrimination is statistically proven.

Data

A valid statistical sample of domestic corporations was drawn and the franchise tax difference was computed for each corporation "as if it were a foreign corporation." This resulted in a set of paired observations for each sample corporation; for each sample corporation the paired observations consisted of its known domestic franchise tax and its computed "as if foreign" franchise tax. The difference between the two values ("as if foreign" tax minus domestic tax) would indicate the increase (or decrease) in the franchise tax for the corresponding corporation if it paid franchise tax according to the foreign statute.

[3] This is not to say that each and every one of the corporate differences would be zero if there were no discrimination.

The source data used in the computations were from the computer tapes produced by the Alabama Department of Revenue as discovery responses and identified as FRAN FOR RV.FT.FF.ALL.YRS; RV.FT.FD.ALL.YRS FRAN DOM; RV.FT.SHARES.ALL YRS SHARES; RV.FT. SHARE.TAX.ASSMT; and RV.FT.FRAN.LEDGER, and certain information obtained from the Alabama domestic franchise tax returns, domestic shares tax returns and state income tax returns for the sample corporations.

Prior to the actual sample selection of domestic corporations, the population of domestic corporations was stratified on the basis of the ratio of net worth to par-value. Since the domestic franchise tax is calculated on a tax base of par-value of capital stock while the foreign franchise tax is calculated on a net worth tax base, corporations with similar ratios of net worth to par-value would in most instances have similar dollar differences ("as if foreign" tax minus domestic tax). To the extent that elements in a population can be grouped into non-overlapping sub-units (strata) with similar (homogenous) values, stratification yields efficient statistical estimates. Frequency distributions of the ratios of net worth to par-value for each of the years are shown in Tables 1(a-d).

Table 1a

Alabama
1988

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	16226	39.5
.01 - .50	941	2.3
.51 - .99	715	1.7
1	3476	8.5
1.01 - 1.20	756	1.8
1.21 - 1.80	861	2.1
1.81 - 2.60	757	1.8
2.61 - 3.80	846	2.1
3.81 - 5.30	857	2.1
5.31 - 7.00	845	2.1
7.01 - 8.80	775	1.9
8.81 - 10.80	856	2.1
10.81 - 13.40	815	2.0
13.41 - 16.50	819	2.0
16.51 - 20.00	778	1.9
20.01 - 24.00	846	2.1
24.01 - 29.00	765	1.9
29.01 - 36.00	884	2.2
36.01 - 44.00	802	2.0
44.01 - 55.00	864	2.1
55.01 - 67.00	792	1.9
67.01 - 85.00	840	2.0
85.01 - 100.00	608	1.5
100.01 - 130.00	845	2.1
130.01 - 158.00	594	1.4
158.01 - 200.00	584	1.4
200.01 - 280.00	650	1.6
280.01 - 450.00	616	1.5
450.01 - 1150.00	620	1.5
> 1150.00	420	1.0
	41053	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM)+(FD-PARPFRD * FD-TOTALPFRD))

Table 1b

Alabama
1989

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	17415	40.5
.01 - .50	945	2.2
.51 - .99	692	1.6
1	3515	8.2
1.01 - 1.20	873	2.0
1.21 - 1.80	777	1.8
1.81 - 2.60	653	1.5
2.61 - 3.80	846	2.0
3.81 - 5.30	933	2.2
5.31 - 7.00	839	2.0
7.01 - 8.80	723	1.7
8.81 - 10.80	840	2.0
10.81 - 13.40	858	2.0
13.41 - 16.50	836	1.9
16.51 - 20.00	791	1.8
20.01 - 24.00	791	1.8
24.01 - 29.00	772	1.8
29.01 - 36.00	905	2.1
36.01 - 44.00	877	2.0
44.01 - 55.00	939	2.2
55.01 - 67.00	825	1.9
67.01 - 85.00	886	2.1
85.01 - 100.00	641	1.5
100.01 - 130.00	904	2.1
130.01 - 158.00	625	1.5
158.01 - 200.00	641	1.5
200.01 - 280.00	723	1.7
280.01 - 450.00	740	1.7
450.01 - 1150.00	706	1.6
> 1150.00	491	1.1
	43002	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM)+(FD-PARPFRD * FD-TOTALPFRD))

Table 1c

Alabama
1990

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	18246	41.2
.01 - .50	938	2.1
.51 - .99	653	1.5
1	3632	8.2
1.01 - 1.20	749	1.7
1.21 - 1.80	901	2.0
1.81 - 2.60	718	1.6
2.61 - 3.80	798	1.8
3.81 - 5.30	908	2.0
5.31 - 7.00	818	1.8
7.01 - 8.80	729	1.6
8.81 - 10.80	814	1.8
10.81 - 13.40	848	1.9
13.41 - 16.50	819	1.8
16.51 - 20.00	801	1.8
20.01 - 24.00	831	1.9
24.01 - 29.00	798	1.8
29.01 - 36.00	914	2.1
36.01 - 44.00	907	2.0
44.01 - 55.00	968	2.2
55.01 - 67.00	830	1.9
67.01 - 85.00	947	2.1
85.01 - 100.00	631	1.4
100.01 - 130.00	883	2.0
130.01 - 158.00	668	1.5
158.01 - 200.00	668	1.5
200.01 - 280.00	779	1.8
280.01 - 450.00	758	1.7
450.01 - 1150.00	809	1.8
> 1150.00	566	1.3
	44329	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM) + (FD-PARPFRD * FD-TOTALPFRD))

Table 1d

Alabama
1991

Distribution of Ratios of Net Worth to Par-Value

Ratio	Number of Firms	Category Percentage
0	18556	41.9
.01 - .50	888	2.0
.51 - .99	656	1.5
1	3067	6.9
1.01 - 1.20	717	1.6
1.21 - 1.80	890	2.0
1.81 - 2.60	657	1.5
2.61 - 3.80	829	1.9
3.81 - 5.30	879	2.0
5.31 - 7.00	820	1.9
7.01 - 8.80	743	1.7
8.81 - 10.80	810	1.8
10.81 - 13.40	794	1.8
13.41 - 16.50	849	1.9
16.51 - 20.00	808	1.8
20.01 - 24.00	785	1.8
24.01 - 29.00	824	1.9
29.01 - 36.00	983	2.2
36.01 - 44.00	875	2.0
44.01 - 55.00	952	2.1
55.01 - 67.00	846	1.9
67.01 - 85.00	967	2.2
85.01 - 100.00	653	1.5
100.01 - 130.00	975	2.2
130.01 - 158.00	621	1.4
158.01 - 200.00	690	1.6
200.01 - 280.00	851	1.9
280.01 - 450.00	788	1.8
450.01 - 1150.00	863	1.9
> 1150.00	655	1.5
	44291	100

Ratio=TOTSHARES/((FD-PARCOM * FD-TOTALCOM) + (FD-PARPFRD * FD-TOTALPFRD))

Given the similarity of the four distributions, the following stratification was chosen;

Strata	*Ratio*
1	0
2	0.01-2.60
3	2.61-55.00
4	55.01-130.00
5	130.01-450.00
6	450.00 and over
7	Alabama Power Company [4]

Random samples of domestic corporations were drawn form each of the first six strata for each of the four years (1988-1991). The 7th stratum contains only Alabama Power Company and it was selected for each of those four years. The sample corporations were identified and copies of their Alabama tax returns were obtained from the Alabama Department of Revenue. From the data obtained from these sources, the "as if foreign" franchise tax liability for each of the sampled corporations was calculated based on actual financial data of each sampled corporation including an allocation for the estimated capital employed in Alabama. In cases where complete information to calculate the tax liability was not available, conservative assumptions were made in such a manner to reduce the "as if foreign" tax. This procedure resulted in a smaller estimate of the mean difference, as the resulting "as if foreign" franchise tax calculations are lower than they would have been if complete data were available.

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[4] A 7th stratum was established containing only Alabama Power, an Alabama domestic corporation, which is much larger than any of the other domestic corporations. If Alabama Power were left in stratum 6 where it would fall, that stratum would most likely have a large variance which in turn would result in a less efficient estimate. By establishing a separate stratum for Alabama Power, the potentially large or inflated variance can be and is eliminated.

Estimation

The objective of this phase of the research was to statistically estimate the true mean difference per domestic corporation between the franchise tax it actually paid as a domestic corporation and the franchise tax it would have paid if it had been a foreign corporation. As the sampling was stratified random sampling, the appropriate form of the estimator is as shown below.

$$\bar{y}_{st} = \frac{1}{N}[N_1\bar{y}_1 + N_2\bar{y}_2 + \cdots + N_L\bar{y}_L] = \frac{1}{N}\sum_{i=1}^{L} N_i\bar{y}_i$$

where $\bar{y}_{st}$ is the stratified estimator of the population mean difference

$\bar{y}_i$ is the sample mean difference in the ith stratum

N_i is the number of corporations in the ith stratum

N is the total number of corporations in the population

The resulting valid statistical estimates are given in Tables 2(a-d). At the bottom of each table there are two values given. The first is the stratified estimate of the average dollar difference in franchise tax per domestic corporation. The second value is an estimate of the total increase in franchise tax revenue that would have resulted had the domestic corporations actually paid Alabama franchise tax according to the tax statute for foreign corporations, section 40-14-41. The backup materials (data and summary statistics) for Tables 2(a-d) are given in Appendix A.

In order to test the hypotheses that the Alabama franchise tax statutes, facially or as applied, are not discriminatory, it was necessary to estimate the variances of the sampling distributions of the individual estimates. The appropriate estimates of variances result from using the following equation:

$$\hat{V}(\bar{y}_{st}) = \frac{1}{N^2}[N_1^2\hat{V}(\bar{y}_1) + N_2^2\hat{V}(\bar{y}_2) + \cdots + N_L^2\hat{V}(\bar{y}_L)]$$

$$= \frac{1}{N^2}\left[N_1^2\left(\frac{N_1 - n_1}{N_1}\right)\left(\frac{s_1^2}{n_1}\right) + \cdots + N_L^2\left(\frac{N_L - n_L}{N_L}\right)\left(\frac{s_L^2}{n_L}\right)\right]$$

where s_i^2 is the sample variance for the ith stratum

n_i is the sample size from the ith stratum

Table 2a

Alabama Domestic Corporations Treated as if Foreign

Year 1988

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	36	16226	250.65	4067046.90
0.01-2.60	65	7506	78.11	586256.13
2.61-55.00	48	10752	414.12	4452596.74
55.01-130.00	48	3085	1423.87	4392635.87
130.01-450.00	38	2444	3082.50	7533617.78
450.01+	33	1040	7043.81	7325566.56
Alabama Power	1	1	10669463.30	10669463.30
		41054		39027183.27

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation **$950.63**

Stratified Estimate of the Dollar Difference in Franchise Tax Total **$39,027,183**

Table 2b

Alabama Domestic Corporations Treated as if Foreign

Year 1989

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	48	17415	151.82	2643893.06
0.01-2.60	48	7455	162.98	1214986.08
2.61-55.00	34	10950	473.33	5182985.40
55.01-130.00	40	3256	469.53	1528799.45
130.01-450.00	31	2729	1370.99	3741426.25
450.01+	35	1197	13460.21	16111872.57
Alabama Power	1	1	11381091.23	11381091.23
		43003		41805054.03

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation **$972.14**

Stratified Estimate of the Dollar Difference in Franchise Tax Total **$41,805,054**

Table 2c

Alabama Domestic Corporations Treated as if Foreign

Year 1990

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	49	18246	55.12	1005664.78
0.01-2.60	79	7591	53.39	405306.26
2.61-55.00	30	10953	471.26	5161656.02
55.01-130.00	45	3291	744.55	2450327.21
130.01-450.00	40	2873	1671.65	4802644.70
450.01+	40	1375	12043.69	16560073.75
Alabama Power	1	1	12610767.46	12610767.46
		44330		42996440.19

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation **$969.92**

Stratified Estimate of the Dollar Difference in Franchise Tax Total **$42,996,440**

Table 2d

Alabama Domestic Corporations Treated as if Foreign

Year 1991

Stratum	Sample Size	Stratum Size	Sample Mean	Ni*Sample Mean
0	58	18556	362.42	6725065.52
0.01-2.60	75	6875	43.34	297948.75
2.61-55.00	41	10951	550.31	6026422.908
55.01-130.00	46	3441	1121.71	3859786.905
130.01-450.00	30	2950	1431.41	4222671.3
450.01+	40	1518	8709.94	13221694.99
Alabama Power	1	1	11980011.20	11980011.2
		44292		46333601.58

Stratified Estimate of the Dollar Difference in Franchise Tax per Corporation $1,046.09

Stratified Estimate of the Dollar Difference in Franchise Tax Total $46,333,602

The computations of the various estimated variances are given in Appendix B.

Statistical Tests of Discrimination

Given the sample sizes and that the sampling was stratified random, the sampling distributions of the various annual estimates of the true mean differences would be approximately normally distributed. Therefore, the estimated mean difference divided by the positive square root of the estimated variance of its sampling distribution (estimated standard error) would approximately follow a standard normal probability density function *if the true means of the populations of differences were zero.* By dividing the estimate of the true mean difference for each year by its estimated standard error and comparing the resulting value to the standard normal distribution, the

hypothesis that the true mean difference is zero can be tested. Table 3 shows the results of the procedure.

Table 3

Year	Estimated Mean Difference	Estimated Standard Error	Computed Z	One-Tail P value
1988	950.63	194.21	4.89	0.000000
1989	972.14	206.50	4.71	0.000001
1990	969.92	173.98	5.57	0.000000
1991	1046.09	133.35	7.84	0.000000

The computed Z values and their associated one-tail P values indicate that the sample results strongly refute the hypotheses that the true mean differences are zero and lead to the rejection of these hypotheses. The P value is the probability of observing a sample results as extreme as that observed (that indicates discrimination in favor of the domestic corporation as strongly as the sample does) if the hypothesis (true mean difference equal zero and thus, no discrimination in favor for the domestic corporations) is in fact true. The P values near zero (only 1989 is not zero rounded to six decimal places) indicate that it would be next to impossible (less than one chance in a million) to draw a stratified random sample (as we did) and obtain sample results as extreme as those that resulted if in fact the true population mean differences were zero. These statistical tests clearly lead to the rejection of the hypotheses that discrimination does not exist.

An alternative way to describe the statistical results would be to give confidence interval estimates for the true mean difference for each year. This is accomplished by adding and subtracting 1.96 times the estimated standard error to the estimated mean difference to arrive at the resulting 95% confidence interval. Table 4 shows the results for this procedure.

Table 4

Year	Estimated Mean Difference	Estimated Standard Error	Lower Limit	Upper Limit
1988	950.63	194.21	569.98	1331.28
1989	972.14	206.50	567.40	1376.88
1990	969.92	173.98	628.92	1310.92
1991	1046.09	133.35	784.72	1307.46

A confidence interval is designed to capture or contain the true population value, in this case the true mean difference between the "as if foreign" franchise tax and the actual domestic franchise tax per domestic corporation. The only acceptable (statistically founded) estimate is or would be the point estimate on which the interval is based. In our case this point estimate is called "Estimated Mean Difference". The fact that none of the 95 percent intervals contains zero also allows the statistical conclusion that the true mean differences are not zero.

Estimation of Tax Rates

Given the sample data used to investigate the existence of discrimination between the Alabama franchise tax statutes, it was also possible to estimate the effective tax rates for domestic corporations based on their capital employed in Alabama. By statute § 40-14-41 foreign corporations pay Alabama franchise tax at the rate of $3 per thousand dollars of capital employed in Alabama. Therefore, the appropriate comparison would be to the tax rate (domestic franchise tax divided by the capital employed in Alabama (000) dollars) for domestic corporations.

Table 5 gives three different tax rates. Column (C) shows the statutory $3 or 3.00 tax rate for foreign corporations. Column (E) represents the ratio of domestic franchise tax to capital employed in Alabama for domestic corporations and is therefore, the estimated domestic franchise tax rate. We can see that the estimates of the effective domestic franchise tax rates are less than $0.60.

This means that the domestic corporations paid the annual franchise tax at a rate of less than $0.60 per thousand dollars of capital employed in Alabama. Or, said another way, the foreign corporations paid franchise tax to Alabama at five times ($3.00/$0.60 = 5) the rate of the domestic corporations.

It is my understanding that Alabama Department of Revenue contends that the Alabama shares tax is a complementary tax to the franchise tax for domestic corporations. By statute, the shares tax is not a tax liability of the domestic corporation but is imposed on the shareholders of the corporation. In the event that a decision is made that the shares tax is complementary and therefore should be included in the analysis of discrimination, I have shown the results of the inclusion. Figure 2 provides a graphic view of this procedure and Table 5 shows the average shares tax for domestic corporations in column (F). These values are based on the statewide composite millage rates provided by the Alabama Department of Revenue. Column (G) is the sum of columns (D) and (F) and is therefore the total tax (franchise tax plus shares tax). Column (H) is then the total tax divided by the capital employed in Alabama and is the estimated domestic total tax rate. We can see that these rates are approximately 1.5 (or $1.50) which indicates that even if one includes the shares tax, the domestic corporations have an effective tax rate that is only half that of the foreign corporations ($1.50 domestic vs. $3.00 foreign).

Table 5a is identical to Table 5 with the exception that the maximum millage rate per county was used to estimate shares tax. Clearly the domestic total tax rates in column (H) in Table 5a would overstate the actual tax rates as not all corporations within a given county are located in that area with the maximum millage rate.

Table 5
Estimated Tax Rates per $1000 of Capital Employed in Alabama

Year	(A) Capital Employed in Alabama (000)	(B) Average "As if Foreign" Franchise Tax	(C) Foreign Franchise Tax Rate	(D) Domestic Franchise Tax	(E) Domestic Franchise Tax Rate	(F) Shares Tax (composite)	(G) Average Total Tax per Dom. Corp.	(H) Domestic Total Tax Rate
1988	$393.95	$1,181.85	3.00	$231.22	0.587	$333.16	$564.38	1.433
1989	$400.20	$1,200.61	3.00	$228.47	0.571	$404.39	$632.86	1.581
1990	$398.32	$1,194.97	3.00	$225.05	0.565	$375.13	$600.18	1.507
1991	$417.18	$1,251.55	3.00	$205.48	0.492	$403.02	$608.48	1.459

Formulas and Definitions for Columns

(A) is the estimated average capital employed in Alabama per domestic corporation.
(B) is the estimated average "as if foreign" franchise tax per corporation.
(C) is the statutory or actual foreign franchise tax rate.
(D) is the estimated average domestic franchise tax per corporation.
(E) equals (D)/(A) and is the estimated domestic franchise tax rate.
(F) is the average shares tax per corporation using the statewide composite millage rate.
(G) equal (D)+(F) and is the estimated average total tax per domestic corporation.
(H) equals (G)/(A) and is the estimated total tax rate per domestic corporation.

Table 5a
Estimated Tax Rates per $1000 of Capital Employed in Alabama

Year	(A) Capital Employed in Alabama (000)	(B) Average "As if Foreign" Franchise Tax	(C) Foreign Franchise Tax Rate	(D) Domestic Franchise Tax	(E) Domestic Franchise Tax Rate	(F) Shares Tax (county max)	(G) Average Total Tax per Dom. Corp.	(H) Domestic Total Tax Rate
1988	$393.95	$1,181.85	3.00	$231.22	0.587	$413.24	$644.46	1.636
1989	$400.20	$1,200.61	3.00	$228.47	0.571	$490.32	$718.79	1.796
1990	$398.32	$1,194.97	3.00	$225.05	0.565	$462.41	$687.46	1.726
1991	$417.18	$1,251.55	3.00	$205.48	0.492	$479.05	$684.51	1.641

Formulas and Definitions for Columns

All columns in Table 5a are the same as in Table 5 except for column (F).
(F) is the average shares tax per corporation using the county maximum millage rate.

Figure 2

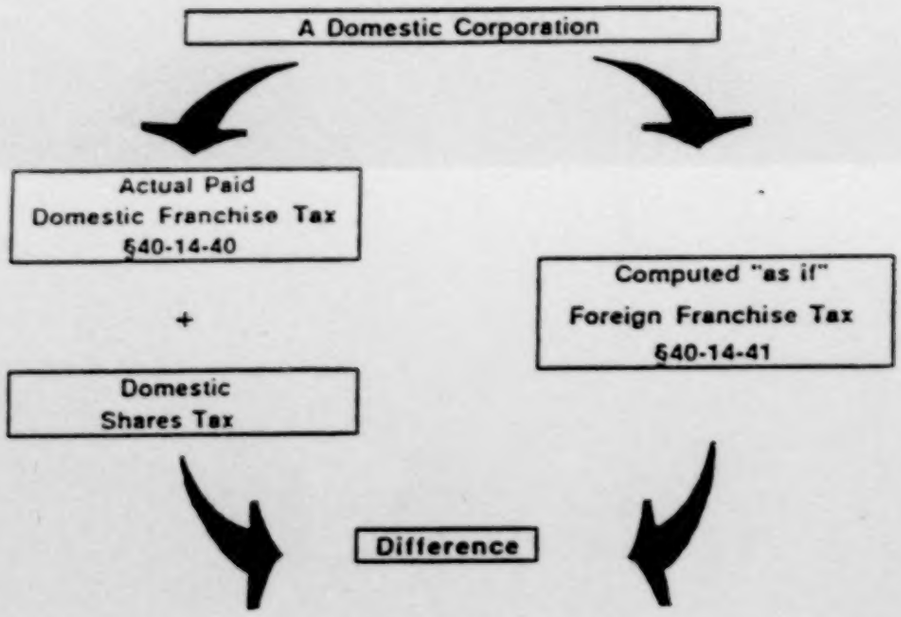
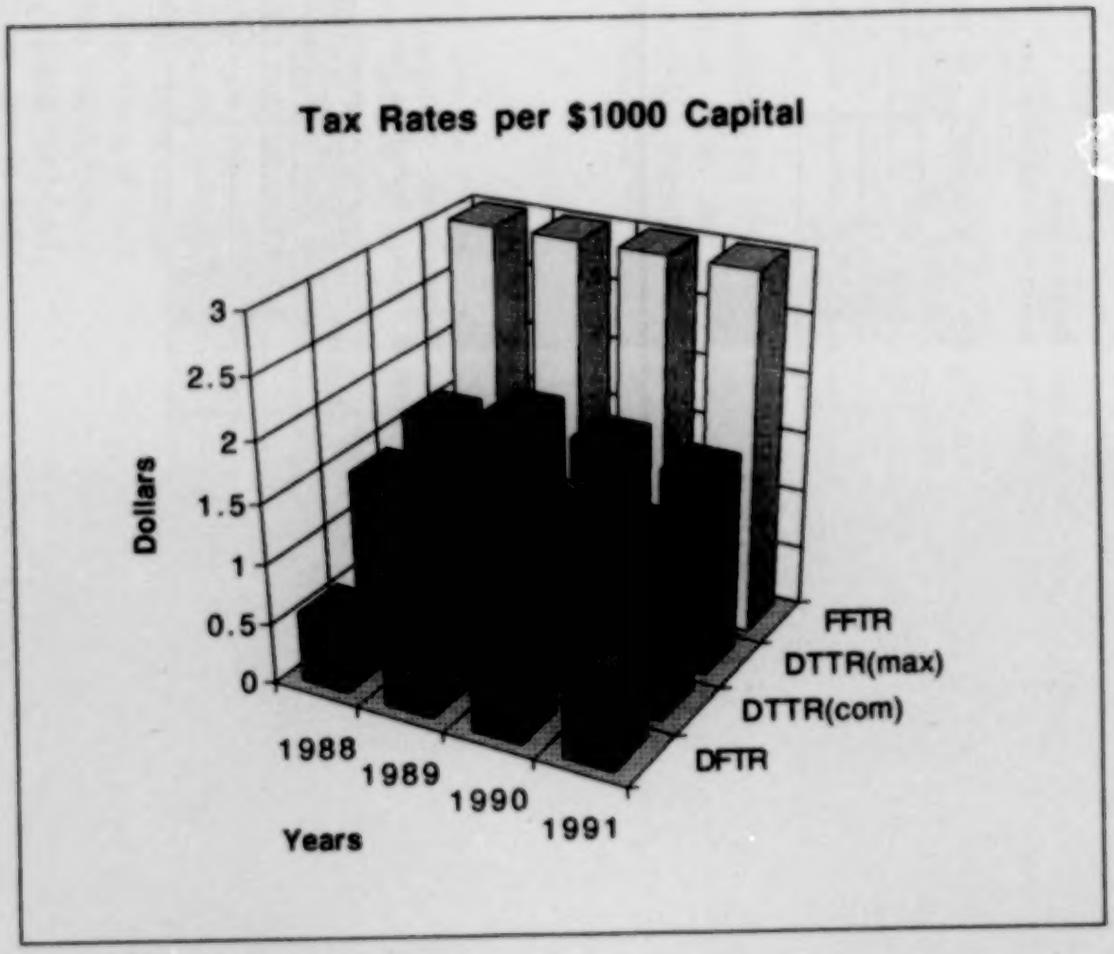

A Domestic Corporation
Actual Paid
Domestic Franchise Tax
§40-14-40
+
Domestic
Shares Tax
Computed "as if"
Foreign Franchise Tax
§40-14-41
Difference

Figure 3



DFTR is the domestic franchise tax rate.
DTTR(com) is the domestic total (franchise plus shares) tax rate.
DTTR(max) is DTTR using county maximum millage rate.
FFTR is the foreign franchise tax rate.

Table 6

Discrimination in favor of Domestic Corporations
Comparing Total Domestic Tax (Franchise plus Shares) to Foreign Franchise Tax

Year	Discrimination per Corporation	Average Domestic Franchise Tax	Shares Tax (composite)	Average Total Tax per Dom. Corp.	Average "As if Foreign" Franchise Tax	Percent Discrimination	Discrimination Total
1988	$617.47	$231.22	$333.16	$564.38	$1,181.85	109%	$25,349,613
1989	$567.75	$228.47	$404.39	$632.86	$1,200.61	90%	$24,414,953
1990	$594.79	$225.05	$375.13	$600.18	$1,194.97	99%	$26,367,041
1991	$643.07	$205.46	$403.02	$608.48	$1,251.55	106%	$28,482,856

Table 6a

Discrimination in favor of Domestic Corporations
Comparing Total Domestic Tax (Franchise plus Shares) to Foreign Franchise Tax

Year	Discrimination per Corporation	Average Domestic Franchise Tax	Shares Tax (county max)	Average Total Tax per Dom. Corp.	Average "As if Foreign" Franchise Tax	Percent Discrimination	Discrimination Total
1988	$537.39	$231.22	$413.24	$644.46	$1,181.85	83%	$22,062,009
1989	$481.82	$228.47	$490.32	$718.79	$1,200.61	67%	$20,719,705
1990	$507.51	$225.05	$462.41	$687.46	$1,194.97	74%	$22,497,918
1991	$567.04	$205.46	$479.05	$684.51	$1,251.55	83%	$25,115,336

Figure 3 gives a graphic view of the four different tax rates. The discrimination in favor of the domestic corporations is clearly evident. Table 6 shows the discrimination between total domestic tax (domestic franchise tax plus domestic shares tax) and foreign franchise tax. The next to last column in Table 6 indicates that the discrimination is approximately 100%. This means that the "as if foreign" franchise tax for the domestic corporations would be twice (two times) their total domestic tax.

As with Table 5, Table 6a is identical to Table 6 with the exception that the maximum millage rate per county was used to estimate shares tax. Again, the "Average Total Tax per Dom. Corp." column in Table 6a would clearly overstate the actual tax level.

The statistical procedures that have been applied in this research (stratification, sampling, estimators, tests and interval estimates) have mathematical (provable) foundations and are in accordance with generally accepted valid statistical practice and procedures.

Conclusion

The mean difference ("as if foreign" franchise tax minus actual domestic franchise tax) for the population of domestic corporations in Alabama is positive (above zero) in each of the years 1988, 1989, 1990 and 1991. Therefore, discrimination does exist and the discrimination is in favor of the domestic corporations. The population of domestic corporations in Alabama for each of the years in 1988-1991 time period paid less franchise tax in Alabama than they would have paid as foreign corporations and they would have paid more in franchise taxes if they had been subject to the same franchise tax calculation or treatment as a foreign corporation under section 40-14-41. Even if it is ruled that the Alabama shares tax is complementary to the franchise tax and should therefore be included in the comparison between domestic and foreign corporations, substantial (foreign tax rate twice that for domestics) discrimination is established.

[Pl. Trial Exh. 3]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-90-2555-G

CSX TRANSPORTATION, INC., A Corporation

CV-90-2556-M

CSX TRANSPORTATION, INC., A Corporation

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE

CV-90-2557-PH

CSX TRANSPORTATION, INC., A Corporation

CV-90-2558-PR

CSX TRANSPORTATION, INC., A Corporation

v.

JAMES M. SIZEMORE, JR., As Commissioner of Revenue;
and STATE OF ALABAMA, DEPARTMENT OF REVENUE

CONSOLIDATED DISCOVERY—
INTERROGATORIES, REQUESTS FOR
PRODUCTION AND REQUESTS FOR
ADMISSIONS BY TAXPAYER

TAXPAYER'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO COMMISSIONER AND DEPARTMENT

I.

DIRECTIONS FOR ANSWERING INTERROGATORIES AND PRODUCING MATERIALS AND THINGS

1. Interrogatories are to be answered under oath within the time required by law, unless the time is shortened by the Court.

2. There is a space provided between each interrogatory and it is requested that you place your answers in the space provided below each question if possible. If additional space is required, please note that additional space is required for your answer and attached the additional pages to your answers.

3. Materials to be produced for inspection and copying are to be produced at the offices of Steiner, Crum & Baker, 8th Floor, First Alabama Bank Building, 8 Commerce Street, Montgomery, Alabama 36014, within the time prescribed by law, unless the time is shortened by the Court. Alternatively, you may produce copies of the materials requested in the office of the general counsel or Chief of the Franchise Tax Division of the State of Alabama Department of Revenue or by sending the same to the offices of Steiner, Crum & Baker.

DEFINITIONS

The following are definitions of various words and phrases which are contained in the attached discovery requests for the purpose of clarifying the meaning of various words and phrases contained herein in order to assist the State of Alabama Department of Revenue and its Commissioner to understand the objectives of these

discovery efforts and to locate and furnish the relevant information and materials. An affirmative response on the part of Department or Commissioner will not be construed as an admission that any definition contained herein is either factually correct or legally binding on them

1. DEPARTMENT means State of Alabama Department of Revenue.

2. COMMISSIONER means James M. Sizemore, Jr., as Commissioner of Revenue of the State of Alabama.

3. CSXT or TAXPAYER means singly CSX Transportation, Inc. and collectively CSX Transportation, Inc. and its predecessor corporations, Seaboard Coast Line Railroad Company, Louisville & Nashville Railroad Company and Seaboard System Railroad, Inc.

4. ALA. CODE or CODE means Code of Alabama 1975, as amended.

5. CAPITAL means and refers to capital as defined in Ala. Code § 40-14-41(b).

6. DOMESTIC CORPORATION means and refers to a domestic corporation as more particularly defined in Ala. Code § 40-14-40.

7. FOREIGN CORPORATION means and refers to a foreign corporation as defined in Ala. Code § 40-14-41.

8. DOCUMENT means the original or any copy of any written, recorded, transcribed, printed or impressed matter of whatever kind, however produced or reproduced, including but not limited to sound pictorial recordings, word processing, electronic or computerized information, books, pamphlets, letters, memoranda, telegrams, electronic or mechanical transmissions, communications of all kinds, reports, operating statements, working papers, handwritings, charges, graphs, papers, writings, printings, transcriptions, copies, photographic reproduction, data compilations from which information can be obtained, tapes and records of all kinds.

III

Requests for Admissions

Pursuant to Rule 36 A.R.Civ.P., Taxpayers request Department and Commissioner to admit the truth of the following facts:

1. A. CSXT and each and all of the other predecessor companies are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to Ala. Code § 40-14-41(a).

B. For the purposes of Alabama franchise tax, CSXT is and each of its predecessor companies is a foreign corporation by reason of its state of incorporation being other than Alabama.

2. A foreign corporation, for the purposes of Alabama franchise tax, is any corporation "organized under the laws of any state other than Alabama—organized under the laws of any other state, national or territory. . . ." Ala. Code § 40-14-41(a).

3. A domestic corporation, for the purposes of Alabama franchise tax, is any corporation organized under the laws of Alabama—"every corporation organized under the laws of this state. . . ." Ala. Code § 40-14-40.

4. A. All foreign corporations, including CSXT are required to file its franchise tax return and are required to pay Alabama franchise tax as a foreign corporation pursuant to Ala. Code § 40-14-41. Each foreign corporation doing business in Alabama pays franchise tax to the State of Alabama in an amount which is determined by applying the tax of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to statute, the amount of capital employed against which this tax rate is multiplied is the total actual value of the following items of capital employed by that foreign corporation in the State of Alabama, sub-

ject to the exclusions and deductions from the tax base as set forth in Ala. Code § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

B. The franchise tax imposed upon CSXT and other foreign corporations is based on the actual value of the capital employed in the State of Alabama, including the actual value of each of its components set forth in Ala. Code § 40-14-41:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

Subject to the exclusions and deductions and maximum set forth in A.

5. A. The Alabama franchise tax is imposed upon foreign corporations pursuant to Ala. Code § 40-14-41 for the privilege of doing business within the State of Alabama.

B. The Alabama franchise tax is imposed upon domestic corporations pursuant to Ala. Code § 40-14-40

for the identical privilege of doing business within the State of Alabama.

6. Art. XII, § 232, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state."

7. Art. XII, § 232, Constitution of Alabama of 1901, does not define "capital employed in this state" to include:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

8. The Alabama franchise tax imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 is computed by applying the tax rate of $10 per $1,000 to the amount of the par value of the capital stock of the corporation.

9. Art. XII, § 229, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock."

10. The tax base for the Alabama domestic franchise tax does not include the actual value of its capital stock.

11. The Alabama franchise tax imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations is not computed by applying the applicable tax rate multiplied by the actual value of the capital stock of the domestic corporation.

12. The tax base upon which Alabama franchise tax is imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations does not include surplus and undi-

vided profits, long-term debt, the amount of certain related party debt, or the accelerate depreciation of the domestic corporation, which are not factors in determining the amount of franchise tax to be paid by a domestic corporation.

13. The tax base of foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid by foreign corporations pursuant to Ala. Code § 40-14-42, includes items of capital not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid by domestic corporations pursuant to Ala. Code § 40-14-40.

14. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40.

15. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40, to authorize or require the levy of the domestic franchise tax base solely upon the par value of a domestic corporation's capital stock.

16. Department and Commissioner have for the purposes of determining the franchise tax levied on a domestic corporation pursuant to Ala. Code § 40-14-40 based the levy of such tax solely upon the par value of the capital stock of each domestic corporation.

17. Department and Commissioner for the purposes of determining the franchise tax on foreign corporations, including CSXT, pursuant to Ala. Code § 40-14-41 has based the levy on the full actual value of capital employed in the State of Alabama, including the outstanding capital stock, surplus and undivided profits, long-term

debt, certain related party debts and accelerated depreciation of each foreign corporation.

18. The par value of shares of capital stock of a domestic corporation is a fictitious value which does not represent the actual value of the capital stock of that domestic corporation.

19. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock.

20. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock, without any basis, measure or yardstick for determining "par value" or the amount of "par value."

21. A domestic corporation can reduce the amount of franchise tax paid by it pursuant to Ala. Code § 40-14-40 by reducing the par value of its capital stock.

22. A foreign corporation doing business in the State of Alabama cannot reduce the amount of Alabama franchise taxes paid by it pursuant to Ala. Code § 40-14-41 by reducing the par value of its capital stock.

23. A foreign corporation doing business in the State of Alabama cannot reduce the actual amount of its capital employed in Alabama by reducing the par value of its capital stock.

24. CSXT and other foreign corporations who engage in business within Alabama are required to pay taxes on the tax base set forth in Ala. Code § 40-14-41 solely by virtue of the fact that they are organized in a state other than the State of Alabama.

25. Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to Ala. Code § 40-14-40 based on a tax base of the

"par value" of the shares of capital stock of domestic corporations while levying the Alabama franchise tax on CSXT and other foreign corporations engaging in business within Alabama pursuant to Ala. Code § 40-14-41, based on the full actual value of capital employed in the State of Alabama by each of the foreign corporations which tax base include the full actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation subject to the exclusion and deductions set forth in § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as CSXT, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama.

26. There is no statutory basis for using "par value" of capital stock as a tax base for domestic corporations.

27. There is no basis in the Alabama Constitution for using "par value" of capital stock as a tax base for domestic corporations.

28. The Department and Commissioner use "par value" of capital stock as the sole tax base for domestic corporations.

IV

Request for Production

Pursuant to Rule 34, A.R.Civ.P., CSXT requests and move the production of the following documents and things:

1. For each of the franchise tax years 1982 through 1991—

(a) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing

for each corporation filing a domestic franchise tax return or paying domestic franchise taxes for that year, the following:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of domestic franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed;

(vii) The amount of corporate shares tax paid by the domestic corporation.

(b) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing for each corporation filing a foreign franchise tax return or paying foreign franchise taxes for that year:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of foreign franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed.

(c) All documents and all studies and all accumulations or compilations of information and data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of capital employed within the State of Alabama for that year by each domestic corporation and by each foreign corporation, and the total amount of capital employed in Alabama by all domestic corporations and the total amount of capital employed in Alabama by all foreign corporations.

(d) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of Alabama franchise taxes paid by domestic corporations, the total amount of franchise taxes paid by foreign corporations and the percentage of the total franchise tax paid by domestic corporations and by foreign corporations.

(e) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the actual amount of capital for each domestic corporation who filed an Alabama domestic franchise tax return

or paid Alabama domestic franchise taxes and the total amount of that capital employed in Alabama.

V

Interrogatories

Pursuant to Rule 33, A.R.Civ.P., CSXT directs the following written interrogatories each to the Department and Commissioner to be answers separately and fully in writing under oath, in the space provided following each interrogatory:

1. State the name, address, telephone number and job position of every person participating in or providing information for response to these interrogatories or the requests for production, and the source of the information provided.

2. For each year after the enactment of Act No. 464, General Acts of Alabama 1915, levying a franchise tax on both domestic and foreign corporations identify the tax base used by Department in levying the franchise tax on foreign corporations based upon "the actual amount of capital actually employed in this state."

A. When did the tax base for foreign corporations first include surplus and undivided profits?

B. When did it first include long-term debt?

C. When did it first include related party debt?

D. When did it first include accelerated depreciation?

3. After the date of first inclusion, has each of these factors enumerated in 2 constantly remained a part of the foreign franchise tax base? If not, when was it discontinued?

4. When was "paid-up capital stock" eliminated from the statute establishing the tax base for domestic franchise taxes?

A. Since the elimination of "paid-up capital stock" as the statutory tax base for domestic franchise taxes, has the Department continued to use that standard or the "par value" of the corporation's stock as the tax base?

B. Has "par value" of the corporate stock of domestic corporations been used by the Department consistently since 1915 as the tax base upon which domestic franchise taxes are applied or calculated?

C. Does "par value" appear in the statute—Ala. Code § 40-14-40—levying Alabama franchise tax on domestic corporations?

D. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual value of the corporate stock of domestic corporations?

E. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual market value of the corporate stock of domestic corporations?

F. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual book value of the corporate stock of domestic corporations?

5. Will a change in par value of capital stock of a foreign corporation have any effect on its Alabama franchise tax base or the amount of Alabama foreign franchise tax levied on it? If so, please explain.

6. Is the franchise tax base for foreign corporations increased as it—

A. Retains profits or accumulates surplus?

B. Increases indebtedness?

C. Utilizes accelerated or other method of depreciation so that its depreciation reserve exceeds depreciation computed on the basis of the useful life of its depreciable property.

7. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporations by Ala. Code § 40-14-40?

8. What is the tax base utilized by Department for calculating the franchise tax imposed on foreign corporations by Ala. Code § 40-14-41?

9. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporate shares tax by Ala. Code § 40-14-70, et seq?

10. Identify any legitimate purpose for imposing a disproportionate burden of Alabama franchise taxes on foreign corporations as opposed to domestic corporations.

A. Is enforcement of franchise taxes against foreign corporations easier and less expensive than against domestic corporations?

B. Do domestic corporations employ more state residents than foreign corporations?

C. Are state services utilized more by domestic corporations than by foreign corporations?

D. Are the natural resources of Alabama utilized more or less by domestic corporations than by foreign corporations?

E. Do the statutory provision for corporate dissolution of domestic corporations accrue to the benefit of the state? If so, how?

11. In connection with the domestic corporate shares tax, is the Department or State of Alabama authorized by statute to collect the tax again individual shareholders?

12. In the collection of foreign franchise taxes, can the Department or State of Alabama perfect a lien on or levy against the "capital employed in this state" of foreign corporations?

13. When was the domestic corporate shares tax first enacted in Alabama?

14. State the amount of franchise tax paid by each domestic corporation in the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the aggregate par value of its capital stock, the aggregate book value of its capital stock, and the amount of domestic shares tax paid by it.

15. State the amount of franchise tax paid by each foreign corporation to the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the actual value of the capital employed by it in the State of Alabama as defined in Ala. Code § 40-14-41, the aggregate par value of its capital stock and the aggregate book value of its capital stock.

STEINER, CRUM & BAKER

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for Plaintiffs

P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-90-2555-G
and consolidated cases

CSX TRANSPORTATION, INC.
Plaintiff,

v.

STATE OF ALABAMA DEPARTMENT OF REVENUE,
Defendant.

RESPONSE TO REQUEST FOR ADMISSIONS

Pursuant to Rule 36, *Alabama Rules of Civil Procedure*, the State of Alabama Department of Revenue responds to the Request For Admissions as follows:

1a. Admitted.

1b. Admitted.

2. Admitted.

3. Admitted.

4a. Admitted.

4b. Admitted.

5a. Admitted.

5b. Denied. The tax on domestic corporations is for the privilege of existing in corporate form.

6. Admitted.

7. The State admits that there is no definition of "capital employed in this State" in § 232.

8. Admitted with respect to par value stock. All stock is not "par value" stock. "No par" stock is valued for tax purposes based on the value given in exchange for the stock.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted, except that the tax on domestic corporations is not for the privilege of doing business.

15. The State admits that the term "capital stock" is not defined.

16. Admitted with respect to par value stock.

17. Admitted.

18. Admitted.

19. Admitted, but such actions may require regulatory approval in some cases.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted, except for no par value stock.

26. Denied.

27. Denied.

28. Admitted, except for no par value stock.

STATE OF ALABAMA)

MONTGOMERY COUNTY)

Personally appeared before the undersigned authority in and for said county and state, Ernest J. Broadhead, who after being first duly sworn, deposes on oath and says that the foregoing responses are true and correct to his best knowledge, information and belief.

/s/ Ernest J. Broadhead
ERNEST J. BROADHEAD
Affiant

[Notary Omitted]

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2600-G

SOUTH CENTRAL BELL TELEPHONE COMPANY

CV-90-1591-G

BELLSOUTH CORPORATION, *et al.*

CV-90-1711-G

SOUTH CENTRAL BELL TELEPHONE COMPANY

CV-91-397-G

SOUTH CENTRAL BELL TELEPHONE COMPANY

CV-91-1079-Th

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
Defendants

CONSOLIDATED DISCOVERY—INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS BY TAXPAYERS

TAXPAYERS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO COMMISSIONER AND DEPARTMENT

I.

DIRECTIONS FOR ANSWERING INTERROGATORIES AND PRODUCING MATERIALS AND THINGS

1. Interrogatories are to be answered under oath within the time required by law, unless the time is shortened by the Court.

2. There is a space provided between each interrogatory and it is requested that you place your answers in the space provided below each question if possible. If additional space is required, please note that additional space is required for your answer and attached the additional pages to your answers.

3. Materials to be produced for inspection and copying are to be produced at the offices of Steiner, Crum & Baker, 8th Floor, First Alabama Bank Building, 8 Commerce Street, Montgomery, Alabama 36014, within the time prescribed by law, unless the time is shortened by the Court. Alternatively, you may produce copies of the materials requested in the office of the general counsel or Chief of the Franchise Tax Division of the State of Alabama Department of Revenue or by sending the same to the offices of Steiner, Crum & Baker.

DEFINITIONS

The following are definitions of various words and phrases which are contained in the attached discovery requests for the purpose of clarifying the meaning of various words and phrases contained herein in order to assist the State of Alabama Department of Revenue and

its Commissioner to understand the objectives of these discovery efforts and to locate and furnish the relevant information and materials. An affirmative response on the part of Department or Commissioner will not be construed as an admission that any definition contained herein is either factually correct or legally binding on them.

1. DEPARTMENT means State of Alabama Department of Revenue.

2. COMMISSIONER means James M. Sizemore, Jr., as Commissioner of Revenue of the State of Alabama.

3. BELLSOUTH COMPANIES or TAXPAYERS means collectively South Central Bell Telephone Company ("South Central"), BellSouth Corporation ("BellSouth"), BellSouth Resources, Inc. ("BS Resources"), BellSouth Financial Services Corporation ("BS Financial"), BellSouth Services, Inc. ("BS Services"), BellSouth Advertising & Publishing Company ("BAPCO"), Alabama Cellular Service, Inc. ("AlaCell"), BellSouth Products, Inc. ("BS Products"), TechSouth, Inc. ("TechSouth") and Sunlink Corporation ("Sunlink"). The parenthetical abbreviation of the name of each taxpayer contained in this subsection means and designates that particular taxpayer.

4. ALA. CODE or CODE means Code of Alabama 1975, as amended.

5. CAPITAL means and refers to capital as defined in Ala. Code § 40-14-41(b).

6. DOMESTIC CORPORATION means and refers to a domestic corporation as more particularly defined in Ala. Code § 40-14-40.

7. FOREIGN CORPORATION means and refers to a foreign corporation as defined in Ala. Code § 40-14-41.

8. DOCUMENT means the original or any copy of any written, recorded, transcribed, printed, or impressed

matter of whatever kind, however produced or reproduced, including but not limited to sound pictorial recordings, word processing, electronic or computerized information, books, pamphlets, letters, memoranda, telegrams, electronic or mechanical transmissions, communications of all kinds, reports, operating statements, working papers, handwritings, charges, graphs, papers, writings, printings, transcriptions, copies, photographic reproduction, data compilations from which information can be obtained, tapes and records of all kinds.

III

Requests for Admissions

Pursuant to Rule 36 A.R.Civ.P., Taxpayers request Department and Commissioner to admit the truth of the following facts:

1. A. South Central and each and all of the other BellSouth Companies are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to Ala. Code § 40-14-41(a).

B. For the purposes of Alabama franchise tax, South Central is and each of the BellSouth Companies is a foreign corporation by reason of its state of incorporation being other than Alabama.

2. A foreign corporation, for the purposes of Alabama franchise tax, is any corporation "organized under the laws of any state other than Alabama—organized under the laws of any other state, national or territory. . . ." Ala. Code § 40-14-41(a).

3. A domestic corporation, for the purposes of Alabama franchise tax, is any corporation organized under the laws of Alabama—"every corporation organized under the laws of this state. . . ." Ala. Code § 40-14-40.

4. A. All foreign corporations, including BellSouth Companies, are required to file its franchise tax return

and are required to pay Alabama franchise tax as a foreign corporation pursuant to Ala. Code § 40-14-41. Each foreign corporation doing business in Alabama pays franchise tax to the State of Alabama in an amount which is determined by applying the tax of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to statute, the amount of capital employed against which this tax rate is multiplied is the total actual value of the following items of capital employed by that foreign corporation in the State of Alabama, subject to the exclusions and deductions from the tax base as set forth in Ala. Code § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

B. The franchise tax imposed upon BellSouth Companies and other foreign corporations is based on the actual value of the capital employed in the State of Alabama, including the actual value of each of its components set forth in Ala. Code § 40-14-41:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

Subject to the exclusions and deductions and maximum set forth in A.

5. A. The Alabama franchise tax is imposed upon foreign corporations pursuant to Ala. Code § 40-14-41 for the privilege of doing business within the State of Alabama.

B. The Alabama franchise tax is imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 for the identical privilege of doing business within the State of Alabama.

6. Art. XII, § 232, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state."

7. Art. XII, § 232, Constitution of Alabama of 1901, does not define "capital employed in this state" to include:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

8. The Alabama franchise tax imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 is computed by applying the tax rate of $10 per $1,000 to the amount of the par value of the capital stock of the corporation.

9. Art. XII, § 229, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock."

10. The tax base for the Alabama domestic franchise tax does not include the actual value of its capital stock.

11. The Alabama franchise tax imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations is not computed by applying the applicable tax rate multiplied by the actual value of the capital stock of the domestic corporation.

12. The tax base upon which Alabama franchise tax is imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations does not include surplus and undivided profits, long-term debt, the amount of certain related party debt, or the accelerate depreciation of the domestic corporation, which are not factors in determining the amount of franchise tax to be paid by a domestic corporation.

13. The tax base of foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid by foreign corporations pursuant to Ala. Code § 40-14-42, includes items of capital not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid by domestic corporations pursuant to Ala. Code § 40-14-40.

14. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40.

15. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of doing business in Alabama is not defined in either Art. XII, § 299, AL. CONST. or Ala. Code § 40-14-40, to authorize or require the levy of the domestic franchise tax base solely upon the par value of a domestic corporation's capital stock.

16. Department and Commissioner have for the purposes of determining the franchise tax levied on a domestic corporation pursuant to Ala. Code § 40-14-40

based the levy of such tax solely upon the par value of the capital stock of each domestic corporation.

17. Department and Commissioner for the purposes of determining the franchise tax on foreign corporations, including each of the BellSouth Companies, pursuant to Ala. Code § 40-14-41 has based the levy on the full actual value of capital employed in the State of Alabama, including the outstanding capital stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation of each foreign corporation.

18. The par value of shares of capital stock of a domestic corporation is a fictitious value which does not represent the actual value of the capital stock of that domestic corporation.

19. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock.

20. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action increase or decrease the "par value" of its capital stock, without any basis, measure or yardstick for determining "par value" or the amount of "par value."

21. A domestic corporation can reduce the amount of franchise tax paid by it pursuant to Ala. Code § 40-14-40 by reducing the par value of its capital stock.

22. A foreign corporation doing business in the State of Alabama cannot reduce the amount of Alabama franchise taxes paid by it pursuant to Ala. Code § 40-14-41 by reducing the par value of its capital stock.

23. A foreign corporation doing business in the State of Alabama cannot reduce the actual amount of its capital employed in Alabama by reducing the par value of its capital stock.

24. BellSouth Companies and other foreign corporations who engage in business within Alabama are required to pay taxes on the tax base set forth in Ala. Code § 40-14-41 solely by virtue of the fact that they are organized in a state other than the State of Alabama.

25. Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to Ala. Code § 40-14-40 based on a tax base of the "par value" of the shares of capital stock of domestic corporations while levying the Alabama franchise tax on BellSouth Companies and other foreign corporations engaging in business within Alabama pursuant to Ala. Code § 40-14-41, based on the full actual value of capital employed in the State of Alabama by each of the foreign corporations which tax base include the full actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation subject to the exclusion and deductions set forth in § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama.

26. A. For the tax year 1991, on or before March 15, 1991, each of the following BellSouth Companies timely filed its foreign franchise tax return for 1991 and paid under protest the foreign franchise taxes calculated by it to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

South Central	$5,241,572.00
BSResources	4,685.77
BSFinancial	17,018.24
BSServices	205,634.69
BAPCO	71,880.77

AlaCell	64,990.00
BSProducts	2,917.00
TechSouth	3,720.25
Sunlink	38,062.33

B. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the Complaint in CV-91-1079-Th is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the estimated payment of 1991 foreign franchise taxes paid by each of these Taxpayers was made under protest.

C. All of the statements, allegations and amounts of foreign franchise taxes paid set forth in Paragraph 7 of the Complaint for declaratory judgment and refund of taxes paid under protest in Civil Action CV-91-1079-Th, together with all exhibits attached to said complaint are true, correct and accurate.

27. A. For the tax year 1989, South Central timely filed its foreign franchise tax return for 1989, and the Department made a final assessment against South Central for 1989 foreign franchise taxes in the amount of $5,219,546 and South Central paid to the Department the amount of $5,219,546 in full payment of said final assessment before the same became delinquent and contemporaneously timely filed its Notice of Appeal.

B. Each of the Exhibits "A" through "E", inclusive, attached to the complaint in CV-89-2600-G is a true and correct copy of the items set forth and defined in the complaint.

28. A. For the tax year 1990, South Central timely filed its foreign franchise tax return and the Department entered a final assessment of foreign franchise taxes in the amount of $5,409,568.03 and South Central timely perfected its appeal and contemporaneously paid the Depart-

ment the amount of $5,411,198.31 in full payment of said final assessment plus interest before the same became delinquent.

B. The copy of Exhibit A attached to the complaint in CV-90-1711-P is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1990 foreign franchise taxes calculated by the Department to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41.

29. A. For the tax year 1990, each of the following BellSouth Companies timely filed its foreign franchise tax return for 1990 and paid under protest the foreign franchise taxes calculated by it to be be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

BS Corp	$ 17,590.06
BSServices	205,524.69
BSFinancial	16,908.24
BAPCO	71,860.77
BSResources	4,575.77
AlaCell	45,068.83
Sunlink	37,952.33
TechSouth	3,610.25

B. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the complaint in CV-90-1591-G is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the payment of the 1990 foreign franchise taxes paid by each of these Taxpayers were made under protest. Each of the copies attached as Exhibit "B" to the complaint in CV-90-1591-G

is a true and correct copy of the letter from the Department acknowledging receipt of each of the 1990 franchise tax payments as a payment under protest.

30. A. For each of the tax years 1986, 1987 and 1989, South Central timely filed its foreign franchise tax return and paid foreign franchise taxes calculated by it to be due for each of the years in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

Year	Amount of Tax Paid	Date Tax Paid
1986	$4,952,692.00	August 25, 1986
1987	$4,995,844.00	July 16, 1987
1988	$4,927,214.00	August 16, 1988

B. All of the statements, allegations and amounts of foreign franchise taxes paid in Paragraphs 3, 4 and 5 of the complaint and petition for judicial review in Civil Action CV-91-397-G, together with Exhibits "A", "B" and "C" attached to said complaint, are true, correct and accurate.

IV

Request for Production

Pursuant to Rule 34, A.R.Civ.P., BellSouth Companies request and move the production of the following documents and things:

1. For each of the franchise tax years 1982 through 1991—

(a) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing for each corporation filing a domestic franchise tax return or paying domestic franchise taxes for that year, the following:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of domestic franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed;

(vii) The amount of corporate shares tax paid by the domestic corporation.

(b) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized data or information which may be assembled in a computer printout showing for each corporation filing a foreign franchise tax return or paying foreign franchise taxes for that year:

(i) The identity of the corporation (name may be withheld if identified by symbol or numeral so that the corporation later may be identified);

(ii) The aggregate par value of its capital stock;

(iii) The aggregate book value of its capital stock;

(iv) The aggregate stockholders equity, including actual value of outstanding capital stock, surplus and undivided profits;

(v) The total actual value of capital employed in Alabama as defined in Ala. Code § 40-14-41 to be the tax base upon which foreign franchise taxes were calculated or paid;

(vi) The amount of foreign franchise tax paid or due to be paid on the return as filed, as finally amended or as assessed.

(c) All documents and all studies and all accumulations or compilations of information and data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of capital employed within the State of Alabama for that year by each domestic corporation and by each foreign corporation, and the total amount of capital employed in Alabama by all domestic corporations and the total amount of capital employed in Alabama by all foreign corporations.

(d) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the total amount of Alabama franchise taxes paid by domestic corporations, the total amount of franchise taxes paid by foreign corporations and the percentage of the total franchise tax paid by domestic corporations and by foreign corporations.

(e) All documents and all studies and all accumulations or compilations of information or data including without limitation any computerized date or information which may be assembled in a computer printout showing the actual amount of capital for each domestic corporation who filed an Alabama domestic franchise tax return or paid Alabama domestic franchise taxes and the total amount of that capital employed in Alabama.

V

Interrogatories

Pursuant to Rule 33, A.R.Civ.P., BellSouth Companies direct the following written interrogatories each to the Department and Commisioner to be answers separately and fully in writing under oath, in the space provided following each interrogatory:

1. State the name, address, telephone number and job position of every person participating in or providing information for response to these interrogatories or the requests for production, and the source of the information provided.

2. For each year after the enactment of Act No. 464, General Acts of Alabama 1915, levying a franchise tax on both domestic and foreign corporations identify the tax base used by Department in levying the franchise tax on foreign corporations based upon "the actual amount of capital actually employed in this state."

A. When did the tax base for foreign corporations first include surplus and undivided profits?

B. When did it first include long-term debt?

C. When did it first include related party debt?

D. When did it first include accelerated depreciation?

3. After the date of first inclusion, has each of these factors enumerated in 2 constantly remained a part of the foreign franchise tax base? If not, when was it discontinued?

4. When was "paid-up capital stock" eliminated from the statute establishing the tax base for domestic franchise taxes?

A. Since the elimination of "paid-up capital stock" as the statutory tax base for domestic franchise taxes, has

the Department continued to use that standard or the "par value" of the corporation's stock as the tax base?

B. Has "par value" of the corporate stock of domestic corporations been used by the Department consistently since 1915 as the tax base upon which domestic franchise taxes are applied or calculated?

C. Does "par value" appear in the statute—Ala. Code § 40-14-40—levying Alabama franchise tax on domestic corporations?

D. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual value of the corporate stock of domestic corporations?

E. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual market value of the corporate stock of domestic corporations?

F. Does the statute levying Alabama franchise tax on domestic corporations require the use of other than actual book value of the corporate stock of domestic corporations?

5. Will a change in par value of capital stock of a foreign corporation have any effect on its Alabama franchise tax base or the amount of Alabama foreign franchise tax levied on it? If so, please explain.

6. Is the franchise tax base for foreign corporations increased as it—

A. Retains profits or accumulates surplus?

B. Increases indebtedness?

C. Utilizes accelerated or other method of depreciation so that its depreciation reserve exceeds depreciation computed on the basis of the useful life of its depreciable property.

7. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporations by Ala. Code § 40-14-40?

8. What is the tax base utilized by Department for calculating the franchise tax imposed on foreign corporations by Ala. Code § 40-14-41?

9. What is the tax base utilized by Department for calculating the franchise tax imposed on domestic corporate shares tax by Ala. Code § 40-14-70, et seq?

10. Identify any legitimate purpose for imposing a disproportionate burden of Alabama franchise taxes on foreign corporations as opposed to domestic corporations.

A. Is enforcement of franchise taxes against foreign corporations easier and less expensive than against domestic corporations?

B. Do domestic corporations employ more state residents than foreign corporations?

C. Are state services utilized more by domestic corporations than by foreign corporations?

D. Are the natural resources of Alabama utilized more or less by domestic corporations than by foreign corporations?

E. Do the statutory provision for corporate dissolution of domestic corporations accrue to the benefit of the state? If so, how?

11. In connection with the domestic corporate shares tax, is the Department or State of Alabama authorized by statute to collect the tax again individual shareholders?

12. In the collection of foreign franchise taxes, can the Department or State of Alabama perfect a lien on or levy against the "capital employed in this state" of foreign corporations?

13. When was the domestic corporate shares tax first enacted in Alabama?

14. State the amount of franchise tax paid by each domestic corporation in the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the aggregate par value of its capital stock, the aggregate book value of its capital stock, and the amount of domestic shares tax paid by it.

15. State the amount of franchise tax paid by each foreign corporation to the State of Alabama in each of the franchise tax years 1982 through 1991, inclusive, together with the actual value of the capital employed by it in the State of Alabama as defined in Ala. Code § 40-14-41, the aggregate par value of its capital stock and the aggregate book value of its capital stock.

STEINER, CRUM & BAKER

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for Plaintiffs

P. O. Box 668
Montgomery, AL 36101
(205) 832-8800

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-89-2600-G
and consolidated cases

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Plaintiff,

v.

STATE OF ALABAMA DEPARTMENT OF REVENUE,
Defendant.

RESPONSE TO REQUEST FOR ADMISSIONS

Pursuant to Rule 36, *Alabama Rules of Civil Procedure*, the State of Alabama Department of Revenue responds to the Request For Admissions as follows:

1a. Admitted.

1b. Admitted.

2. Admitted.

3. Admitted.

4a. Admitted.

4b. Admitted.

5a. Admitted.

5b. Denied. The tax on domestic corporations is for the privilege of existing in corporate form.

6. Admitted.

7. The State admits that there is no definition of "capital employed in this State" in § 232.

8. Admitted with respect to par value stock. All stock is not "par value" stock. "No par" stock is valued for tax purposes based on the value given in exchange for the stock.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted, except that the tax on domestic corporations is not for the privilege of doing business.

15. The State admits that the term "capital stock" is not defined.

16. Admitted with respect to par value stock.

17. Admitted.

18. Admitted.

19. Admitted, but such actions may require regulatory approval in some cases.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted, except for no par value stock.

26a. Admitted.

26b. Admitted.

27a. Admitted.

27b. Admitted.

28a. Admitted.

28b. Admitted.

29a. Admitted.

29b. Admitted.

30a. Admitted.

30b. Admitted.

STATE OF ALABAMA)

MONTGOMERY COUNTY)

Personally appeared before the undersigned authority in and for said county and state, Ernest J. Broadhead, who after being first duly sworn, deposes on oath and says that the foregoing responses are true and correct to his best knowledge, information and belief.

/s/ Ernest J. Broadhead
Affiant

[Notary Omitted]

[Pl. Trial Exh. 7]

COMPARISON OF FRANCHISE TAX COLLECTIONS

Calendar Year	Domestic Collections	Foreign Collections	Total Collections
1982	4,956,227	47,024,411	51,980,638
1983	5,041,752	46,956,727	51,998,479
1984	14,670,297	49,600,363	64,270,660
1985	14,005,122	55,498,564	69,503,686
1986	13,254,708	61,771,027	75,025,734
1987	13,055,604	71,970,979	85,026,583
1988	12,608,317	69,000,222	81,608,540
1989	12,652,895	67,439,404	80,092,299
1990	12,424,154	84,250,744	96,674,898
1991	12,245,463	96,290,249	108,535,712
1992	12,596,834	107,612,319	120,209,153

FRANCHISE TAX ACTIVE ACCOUNTS

Calendar Year	Domestic Accounts	Foreign Accounts	Total Accounts
1982	39,799	14,292	54,091
1983	41,899	14,480	56,379
1984	45,099	14,926	60,025
1985	46,178	15,059	61,237
1986	45,208	13,394	58,602
1987	47,111	13,627	60,738
1988	52,841	14,722	67,563
1989	57,628	14,845	72,473
1990	58,527	16,881	75,408
1991	57,211	17,888	75,099
1992	55,579	17,068	72,647

[Pl. Trial Exh. 8]

COMPARISON OF FRANCHISE TAX COLLECTIONS

Fiscal Year	Domestic Collections	Foreign Collections	Total Collections
1979	4,769,827	34,973,891	39,743,718
1980	4,866,324	39,003,401	43,869,725
1981	5,048,643	44,376,222	49,424,865
1982	4,970,474	48,635,047	53,605,521
1983	5,033,277	48,328,529	53,361,806
1984	14,606,245	49,160,353	63,766,598
1985	13,976,379	58,558,109	72,534,488
1986	13,363,250	60,315,840	73,679,090
1987	13,023,273	74,470,832	87,494,105
1988	12,686,153	70,569,055	83,255,208
1989	12,670,488	62,400,724	75,071,212
1990	12,363,098	87,596,290	99,959,388
1991	12,247,206	95,661,379	107,908,585
1992	12,536,527	109,547,939	122,084,466

FRANCHISE TAX ACTIVE ACCOUNTS

Fiscal Year	Domestic Accounts	Foreign Accounts	Total Accounts
1979	35,894	9,419	45,313
1980	36,417	9,803	46,220
1981	37,900	10,582	48,482
1982	38,772	11,234	50,006
1983	39,721	11,497	51,218
1984	40,998	11,954	52,952
1985	42,285	12,718	55,003
1986	47,163	12,776	59,939
1987	48,950	12,913	61,863
1988	52,119	13,878	65,997
1989	56,613	14,640	71,253
1990	60,515	15,566	76,081
1991	55,921	17,629	73,550
1992	52,904	17,951	70,855

(8)

No. 97-2045

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

WALTER HELLERSTEIN
UNIVERSITY OF GEORGIA
LAW SCHOOL
Herty Drive
Athens, Georgia 30602
(706) 542-5175

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

* Counsel of Record

(Additional counsel listed on inside cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33pp

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, following the same practice that this Court condemned in *Richards v. Jefferson County*, 517 U.S. 793 (1996), deprived petitioners of the due process of law guaranteed by the Fourteenth Amendment by barring them from presenting a federal constitutional challenge to a state tax on the theory that petitioners were bound by a prior state-court judgment in a case to which they were not parties, in which they were not represented, and of which they had no notice.

2. Whether Alabama's franchise tax impermissibly discriminates against interstate commerce, in violation of the Commerce Clause, by taxing Alabama corporations only on the par or stated value of their stock (the amount of which is determined solely by the corporation itself) while taxing out-of-state corporations on the actual value of essentially all their capital employed in Alabama, with the demonstrated result that Alabama corporations on average pay less than one-fifth of the franchise tax they would pay if they were incorporated outside Alabama.

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceedings in the Alabama Supreme Court:

State of Alabama, State Department of Revenue
South Central Bell Telephone Company
BellSouth Telecommunications, Inc.
BellSouth Corporation
BellSouth Services, Inc.
BellSouth Financial Services Corporation
BellSouth Advertising & Publishing Corporation
BellSouth Resources, Inc.
BellSouth Products, Inc.
Alabama Cellular Services, Inc.
CSX Transportation, Inc.
Seaboard Coastline Railroad Company
Louisville & Nashville Railroad Company
Seaboard System Railroad, Inc.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

South Central Bell Telephone Company and BellSouth Services, Inc., are predecessors of BellSouth Telecommunications, Inc. Effective July 31, 1998, BellSouth Financial Services Corporation was merged into BellSouth Communication Systems, Inc., an indirect, wholly owned subsidiary of BellSouth Corporation. Each of BellSouth Telecommunications, Inc., BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., BellSouth Products, Inc., and Alabama Cellular Services, Inc., is (directly or indirectly) a wholly owned subsidiary of BellSouth Corporation. These filers' non-wholly owned operating subsidiaries are:

1155 Peachtree Associates
Infoventures
Infoventures of Atlanta
Beijing Ji Tong—BellSouth Communications & Information Engineering Company, Ltd.

Compania de Radiocomunicaciones Moviles S.A.
Otecel S.A.
Telcel Celular C.A.
Tele 2000, S.A.
BellSouth Wireless Data, L.P.
RAM Mobile Data Belgium, S.C.S.
RAM Mobile Data C.V.
BellSouth Carolinas PCS, L.P.
Bloomington Cellular Telephone Company
Chattanooga MSA Limited Partnership
Decatur RSA Limited Partnership
Florida RSA #2B (Indian River) Limited Partnership
Georgia RSA No. 1 Limited Partnership
Georgia RSA No. 2 Limited Partnership
Georgia RSA No. 3 Limited Partnership
Gulf Coast Cellular Telephone Company
Jacksonville MSA Limited Partnership
Lafayette MSA Limited Partnership
Los Angeles Cellular Telephone Company
Louisiana RSA No. 7 Cellular General Partnership
Louisiana RSA No. 8 Limited Partnership
MCTA
Memphis SMSA Limited Partnership
Muncie Cellular Telephone Company, Inc.
Orlando SMSA Limited Partnership
Richmond Cellular Telephone Company
Tennessee RSA Limited Partnership
Terre-Haute Cellular Telephone Company, Inc.

CSX Transportation, Inc., is a wholly owned subsidiary of CSX Corporation. Seaboard Coastline Railroad Company, Louisville & Nashville Railroad Company, and Seaboard System Railroad, Inc., are each predecessors of CSX Transportation, Inc. CSX Transportation, Inc.'s non-wholly owned subsidiaries are:

Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company

Baltimore and Cumberland Valley Rail Road Extension Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Distribution Services, Inc.
Energy Dominion
Gemetal Distribution Services, Inc.
Georgetown Potomac Company
Harbour Associates
Helm-Atlantic Associates, L.P.
High Point, Thomasville & Denton Railroad Company
Home Avenue Railroad Company
Independent Rail Services, Inc.
Indiana Rail Road Company
Lakefront Dock and Railroad Terminal Company
Mahoning State Line Railroad Company
Midland United Corporation
North Charleston Terminal Company
One James Center Associates
Richmond Center Associates
Richmond Center Associates II
Savannah Harbor Resort Developers, LLC
Savannah Harbor Venture Partners, LLC
SHRD, Inc.
Unified Services, Inc.
Washington Harbour Associates Limited Partnership
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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IN THE

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No. 97-2045

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order and accompanying opinions of the Supreme Court of Alabama (Pet. App. 1a-14a) are reported at 711 So.2d 1005. The opinion of the Fifteenth Judicial Circuit Court of Montgomery County, Alabama (Pet. App. 15a-22a) is unreported.

JURISDICTION

The Supreme Court of Alabama entered its judgment on March 20, 1998. The petition for a writ of certiorari was filed on June 18, 1998, and was granted on September 29, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Relevant portions of Alabama statutes, regulations, and rules are set forth at Pet. App. 76a-110a.

STATEMENT

Although Alabama imposes a corporate franchise tax on all corporations, the tax on out-of-state corporations differs significantly from the tax on in-state corporations. The State taxes domestic corporations based on the par value of their stock—an amount that state law permits domestic corporations to set as low as they choose. Alabama corporations can therefore limit their franchise tax liability to a minimal amount simply by reducing their stock's par value. By contrast, Alabama taxes out-of-state corporations based on the "actual amount of [the corporation's] capital employed" in Alabama—an amount that a corporation cannot manipulate through an artificial adjustment to the par value of its stock. This disparate treatment of in-state and out-of-state corporations discriminates against interstate commerce, both facially and in effect: Alabama corporations on average pay less than one-fifth of the franchise tax they would pay if they were incorporated outside of Alabama.

Petitioners (all of whom are incorporated outside of Alabama) challenged Alabama's franchise tax in Alabama

state court. The Alabama trial court, though expressly determining that the franchise tax is unlawfully discriminatory under this Court's Commerce Clause precedents, nevertheless denied relief. Invoking state-law principles of "res judicata," the trial court ruled that petitioners' challenge was barred by a 1989 state-court judgment upholding the franchise tax, even though that judgment had been entered in a case to which petitioners were not parties, in which they were not represented, and of which they had no notice. On appeal, the Supreme Court of Alabama—in a five-to-four decision, and over a vigorous dissent—affirmed without opinion.

The Alabama Supreme Court's judgment is incompatible with this Court's controlling constitutional rulings. *First*, just two years ago, in another state tax case from Alabama, this Court ruled that the Alabama Supreme Court could not, consistent with the Due Process Clause of the Fourteenth Amendment, "bind a litigant to a prior judgment to which he was not a party." *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996). That rule "clearly applies," the Court held, "when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution." *Id. Second*, there can be no doubt, particularly after this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), that Alabama's discriminatory franchise tax scheme violates the Commerce Clause. The Alabama Supreme Court, in default of its constitutional responsibility, simply defied these controlling decisions.

1. *The Tax at Issue.*

Under Alabama law, a domestic corporation (*i.e.*, a corporation organized under the laws of Alabama) must pay a franchise tax "based on its capital stock" at the rate of $10 per $1,000 of capital stock. Ala. Code § 40-14-40.[1] Although the statute does not define "capital

[1] Prior to 1984, the rate was $3 per $1,000 of capital stock. *See* Statement of the Facts (hereinafter "Statement") 11 n.18, 18

stock," Alabama has long equated "capital stock" with the aggregate of the par value of the corporation's stock. *See* Stipulated Facts (hereinafter "Stip.") ¶¶ 9, 17, 56 (Pet. App. 50a, 52a, 61a); *see also White v. Reynolds Metals Co.*, 558 So.2d 373, 375-80 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990); Br. in Opp. 3-4; J.A. 32, 143-46, 150, 154, 161-64, 171, 175. In the case of stock without par value, Alabama applies the term "capital stock" to mean the stock's "stated value." *See* Stip. ¶¶ 9, 17 (Pet. App. 50a, 52a).

The par or stated value of a domestic corporation's stock is determined by the corporation itself and does not represent the stock's market or book value. *See* Stip. ¶¶ 19-24 (Pet. App. 52a-53a). As the parties stipulated, an Alabama corporation "may control the amount of its domestic franchise tax . . . by assigning as the 'par value' or 'stated value' of its capital stock any value selected by it." Stip. ¶ 21 (Pet. App. 52a); *see also* Statement 17 (Pet. App. 30a); J.A. 36-37, 145, 154, 163, 175. Consequently, domestic corporations can (and do) limit their franchise tax liability to a minimal amount by assigning to their stock only a token par or stated value (for example, one cent per share). *See* Stip. ¶¶ 21-24 (Pet. App. 52a-53a); Statement 17 & n.20, 38 (Pet. App. 30a, 46a-47a); J.A. 76-77, 110-11. State law fixes the minimum franchise tax liability for domestic corporations at $50 annually, *see* Ala. Code § 40-14-40; the vast majority of Alabama corporations pay only this minimum amount, *see, e.g.*, Rec. 1329-69.

A foreign corporation's franchise tax liabilty is computed on a different basis. A foreign corporation must pay a franchise tax at the rate of $3 per $1,000 of "the actual amount of [the corporation's] capital employed in

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(Pet. App. 24a, 27a). The years at issue in this case include 1982 through 1991. *See* Pet. App. 16a n.3. The "Statement of the Facts" is a portion of petitioners' pretrial brief that the trial court adopted in full as its own. *See id.* at 21a n.7.

this state." *See* Ala. Code § 40-14-41(a).[2] The statute defines a foreign corporation's "capital" to comprise not only "capital stock" (the sole basis for the domestic franchise tax), but also essentially every other item of capital reflected in the corporation's balance sheet, including "surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation." Stip. ¶ 18 (Pet. App. 52a); *see* Ala. Code § 40-14-41(b)(1)-(5). A foreign corporation, unlike a domestic corporation, thus cannot control its own franchise tax liability by adjusting the par or stated value of its stock. *See* Stip. ¶¶ 25-26 (Pet. App. 53a); J.A. 37-38.

In sum, despite a nominally higher franchise tax rate for domestic than for foreign corporations ($10 per $1,000 of "capital stock" vs. $3 per $1,000 of "capital employed" in Alabama), and despite the inability of domestic corporations to apportion their tax base (the tax applies to the corporation's stock regardless of where it does business), Alabama empowers domestic corporations (but not foreign corporations) to reduce their franchise tax burden to a *de minimis* amount by adjusting the par value of their stock. The demonstrable result, as explained below, is that foreign corporations bear a vastly disproportionate franchise tax burden solely because they are organized under the laws of States other than Alabama. *See infra*, pp. 9-10.

2. *The Reynolds Litigation.*

In 1986, two out-of-state corporations, Reynolds Metals Company and General Motors Corporation, brought suit in Alabama trial court, claiming that Alabama's franchise

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[2] A corporation's capital "employed in" Alabama consists of an apportioned share of its total capital, as determined by the percentage of the corporation's total property, payroll, and sales attributable to Alabama. *See generally* Ala. Code § 40-14-41(c); Ala. Franchise Tax Reg. § 810-2-3-.11 (repealed in 1992 and replaced by comparable provisions in Ala. Franchise Tax Reg. § 810-2-3-.13 (1993)).

tax scheme violated (among other things) the Commerce and Equal Protection Clauses of the United States Constitution. Reynolds and GM argued that, because of the different tax bases used in Sections 40-14-40 and 40-14-41, Alabama's franchise tax scheme discriminated against out-of-state corporations. Proceeding on summary judgment and without a fully developed record, Reynolds and GM supported their discrimination claim by pointing to evidence that the average out-of-state corporation paid significantly more franchise tax than the average Alabama corporation.

The trial court agreed that Sections 40-14-40 and 40-14-41 discriminated against out-of-state corporations. Noting that, in 1982 and 1983, Alabama had collected almost $94 million from 29,000 out-of-state corporations but less than $10 million from 82,000 Alabama corporations, the trial court granted summary judgment for the plaintiffs on the ground that the franchise tax scheme violated the Equal Protection Clause. *See Reynolds Metals Co. v. White*, No. CV-86-1093, slip op. at 3 (Montgomery County Cir. Ct. July 7, 1989).[3] The Alabama Court of Civil Appeals affirmed in all respects. *See White v. Reynolds Metals Co.*, 558 So.2d 367 (Ala. Civ. App. 1989).

Just seven days after the Court of Civil Appeals rendered its decision, however, the Alabama Supreme Court, acting *sua sponte*, issued a writ of certiorari, ordered the parties to file briefs within three days, and scheduled oral argument on the third day after that. Ten days after oral argument, the court issued a decision upholding the franchise tax in all respects. *See White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990).

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[3] In light of its equal-protection holding, the court found it unnecessary to address the *Reynolds* plaintiffs' Commerce Clause claims. *See* slip op. at 2.

In rejecting both the Commerce Clause and Equal Protection Clause attacks on the franchise tax, the Alabama Supreme Court proceeded on the premise that "the ultimate question in applying either equal protection or commerce clause analysis to these facts is virtually the same." *Id.* at 382. That question, the court said, was "whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations." *Id.* (emphasis in original). "[I]n enacting tax statutes," the court stated, "legislatures are not required to reach equality with mathematical precision." *Id.*

Applying these standards, the court pointed to two considerations that, in its view, reduced "the alleged unequal treatment of and discrimination against foreign corporations . . . to a point that no discrimination of constitutional significance exists." *Id.* at 388. *First*, the court said that the plaintiffs had failed to make a sufficient factual showing of discrimination to support their motion for summary judgment—or, indeed, to withstand the State's cross-motion for summary judgment. In the court's view, plaintiffs' summary showing that the average foreign corporation paid more franchise tax than did the average domestic corporation did not necessarily prove discrimination. The higher tax burden on foreign corporations would not be discriminatory at all, the court reasoned, if foreign corporations employed more capital in Alabama than domestic corporations—a question that could not be answered on the record compiled in the case. *See id.* at 383.

Second, the court determined that the foreign franchise tax could in any event be justified under the "complementary tax" doctrine as a levy designed to compensate for the combination of both the domestic franchise tax *and* the State's "domestic shares tax" (Ala. Code § 40-14-70)—an unrelated *ad valorem* property tax im-

posed on shareholders of domestic corporations but, in practice, usually paid by corporations on behalf of their shareholders (*see id.* §§ 40-14-70(c), 40-14-73). *See* 558 So.2d at 384. Adding the domestic shares tax to the domestic franchise tax, the court stated, made the relative tax burdens on domestic corporations "more nearly equivalent to that of foreign corporations." *Id.* at 386. The court neglected to mention that Alabama law also imposes an *ad valorem* shares tax on Alabama residents owning stock in foreign corporations. *See* Ala. Code § 40-11-1(b)(9).

The *Reynolds* decision predated this Court's recent decisions expressly rejecting "a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 n.3 (1996), and narrowly circumscribing the scope of the "complementary" or "compensatory" tax doctrine, *see id.* at 333-44; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994).

3. *The Proceedings Below.*

a. Trial court. While the *Reynolds* case was pending before the Alabama Supreme Court, petitioner South Central Bell Telephone Company (which later became BellSouth Telecommunications, Inc.) brought this action challenging Alabama's franchise tax scheme in the Circuit Court for Montgomery County. Certain of BellSouth's affiliates thereafter filed similar suits. One year later, petitioner CSX Transportation, Inc., and certain of its predecessors also separately brought actions, which, in the aggregate, sought declaratory relief and refunds with respect to tax years 1982 through 1991. After extensive discovery, the court conducted a two-day bench trial in December 1994.

At trial, petitioners sought to remedy the evidentiary deficiencies the Alabama Supreme Court had perceived in *Reynolds*. *First*, petitioners introduced an expert study proving the obvious: that Alabama corporations use their control over their stock's par value to reduce their taxes. The study compared the franchise tax that a random sample of domestic corporations actually paid with what they would have paid if they had been foreign corporations. *See* Statement 23-24, 29 (Pet. App. 35a-36a, 40a); *see also* J.A. 46-61, 62-65, 114-37.[4] The study showed that, on average, domestic corporations, if treated as foreign corporations, would have paid at least five times the amount they actually paid. *See* Statement 24 (Pet. App. 36a) (percentage of discrimination ranging from 409.56% in 1988 to 509.15% in 1991).[5]

Second, petitioners sought to rebut the *Reynolds* court's holding that the foreign franchise tax should be treated as "complementary" to the aggregate of the domestic franchise tax and the domestic shares tax. Petitioners argued that, as a matter of law, a different and unrelated tax like the shares tax could not qualify as an offsetting domestic burden sufficient to defeat a claim of unconstitutional discrimination. But they also showed that, as a matter of fact, the discrimination persists even when one takes full account of the domestic shares tax: the sampled domestic corporations, if treated as foreign corporations, would still have paid, on average, roughly twice as much in foreign franchise tax as they actually paid in domestic

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[4] As the trial court found, *see* note 1, *supra*, the study was based on a "valid statistical sample" of more than 1,000 domestic corporations, using source data provided by the Alabama Department of Revenue and employing "generally accepted valid statistical practice and procedures." Statement 22-23 & n.22 (Pet. App. 34a-35a).

[5] The evidence of discrimination was based on data for tax years 1988 through 1991. The parties stipulated that evidence for the tax years 1988 through 1991 is representative of the other tax years at issue (1982-87). *See* Stip. ¶ 66 (Pet. App. 62a).

franchise and domestic shares taxes combined. *See id.* at 25 (Pet. App. 36a-37a) (percentage of discrimination ranging from 109% in 1988 to 104% in 1991).

Respondents sought to counter this evidence by introducing a study of their own. Instead of analyzing the tax liability of domestic corporations treated "as if foreign," respondents' so-called "Petrillo Study" purported to analyze the tax liability of selected foreign corporations (namely, the BellSouth and CSX taxpayers) treated "as if domestic." *See* Br. in Opp., App. Respondents asserted that, according to their study, petitioners would have paid *more* (not less) in domestic franchise taxes than they had actually paid in foreign franchise taxes. The study, however, was based on the implausible assumption that, if out-of-state corporations were to reincorporate as Alabama corporations, they would maintain their existing capital structure and would not reduce the par value of their stock to minimize their Alabama tax liability.[6]

Rejecting the Petrillo study, the Circuit Court agreed with petitioners that they had accomplished their objective of filling the evidentiary gaps in the *Reynolds* record: "The Court finds that the Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incor-

[6] Besides being unrealistic, this assumption was at odds with undisputed trial testimony that, if petitioners were to reincorporate in Alabama, they would reduce the par value of their stock to minimize their franchise tax liability. *See* J.A. 102, 107; Tr. 279-80. The Petrillo study also suffered from additional flaws: it mistakenly treated as the par value of capital stock figures that some of the BellSouth taxpayers had in fact reported as their book value, *see* J.A. 98-104, 107-10, and it ignored a Georgia statute expressly fixing the par value of the BellSouth taxpayers at a penny, *see* J.A. 97-105.

poration." Pet. App. 21a-22a (footnote omitted).[7] The court also agreed with petitioners' legal arguments that this Court's recent decisions had thoroughly undermined the Alabama Supreme Court's reasoning in *Reynolds* by confirming both that there is no "de minimis" exception to the Commerce Clause's ban on discrimination against interstate commerce and that discrimination caused by one state tax (like Alabama's franchise tax) cannot be offset by an unrelated state tax (like the domestic shares tax):

> [T]he Court believes that since 1989, the United States Supreme Court has made it abundantly clear that a state's tax scheme cannot impose the slightest burden on interstate commerce unless there is some reason for doing so other than economic protectionism. *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. [93], 114 S. Ct. 1395 (1994); *Associated Industries v. Lohman*, 511 U.S. [641], [114] S. Ct. [1815] (1994). In addition, the decision in *Fulton Corporation v. Faulkner*, [516] U.S. [325], 133 L.Ed.2d 796 (1996), enlightens the analysis of the complementary tax doctrine and appears to super[s]ede the reasoning of the *Reynolds* court.

Id. at 21a. The court therefore concluded "that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution." *Id.* at 22a.

Nevertheless, the Circuit Court entered judgment against petitioners. Referring to the earlier *Reynolds* litigation, the court said in a single unexplained sentence—for which it cited no authority—that, "based upon Alabama juris-

[7] The omitted footnote states: "See Taxpayers' brief filed May 17, 1994, pp. 10-39, which the Court finds to fairly state the evidence in this case and, except as otherwise indicated, the Court adopts as its own." Pet. App. 21a n.7. The portion of petitioners' trial court brief that the court adopted as its own is the "Statement of the Facts" reproduced at Pet. App. 23a-47a.

prudence, the Taxpayer's claims are barred by *res judicata*." *Id.* at 17a. The court so held even though none of the taxpayers was a party to the *Reynolds* litigation; none had an opportunity to present evidence or argument in the *Reynolds* litigation; none was in any way affiliated with the *Reynolds* plaintiffs; none had authorized them to represent its interests; none in any way controlled the prosecution of the *Reynolds* case or shared in the plaintiffs' legal expenses; and, indeed, none was even *aware* of the *Reynolds* litigation until after the trial court issued its decision in that case. *See* Tr. 131-32, 192-93 (Pet. App. 69a-70a, 73a-74a).

Having concluded that the taxpayers' claims were barred by state-law res judicata principles, the Circuit Court turned to the question whether denying the taxpayers their day in court would violate their federal due process rights. The court acknowledged that, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court had invalidated a similar application of res judicata. In *Richards*, the Alabama Supreme Court had held that a decision in a prior action brought by one set of taxpayers barred an action by a second, unrelated set of taxpayers on the theory that the first set of taxpayers "adequately represented" the second. *Id.* at 796. This Court reversed the Alabama Supreme Court's decision as an "extreme application of state-law res judicata principles" violative of due process. *Id.* at 804.

But the Circuit Court held that *Richards* was distinguishable on two grounds. *First*, the court believed that petitioners here, unlike the petitioners in *Richards*, could be said to have had "notice" of the prior litigation. Pet. App. 19a. The court used the term "notice," however, in a decidedly unorthodox manner: *not* to signify notice to non-parties that their rights might be adjudicated preclusively in pending litigation, but rather to signify merely a general *awareness* of the pending litigation—and even then an imputed rather than an actual awareness. The court stated that, because petitioners are "large and sophisticated corporations," it was reasonable to assume that they "are well informed in all matters involving issues of national and state taxation, and that they stay well informed of significant pending legal actions and court decisions." *Id.* at 18a. The court added that petitioners "admit[ted]" that, by the time they brought suit in this case, they had become aware of the trial-court decision in *Reynolds* and, in that sense, had acquired "actual notice" of that litigation. *See id.* at 18a-19a.

Second, the Circuit Court apparently concluded that it was more reasonable in this case than it had been in *Richards* to hold that unrelated taxpayers in the earlier case adequately represented taxpayers in the later case. The court noted that the "*Reynolds* taxpayers were represented by well known and excellent counsel"; that, even though "all of the precise arguments may not have been made in *Reynolds* that are presented to this Court, the *Reynolds* action and this action arise out of the same nucleus of operative facts"; that the taxpayers' basic Commerce Clause claim was "addressed and decided in *Reynolds*"; that "[t]here was not a significant lapse of time between the *Reynolds* litigation and these . . . actions"; that "[t]here is no conflict between the interests of the *Reynolds* taxpayers and the Taxpayers in this action"; and that petitioners were "represented by the same attorney." *Id.* at 19a.[8]

[8] The court was apparently referring to the fact that Professor Walter Hellerstein, co-counsel to petitioners in this case, also represented the *Reynolds* plaintiffs. The court failed to mention that Professor Hellerstein represented the *Reynolds* plaintiffs only in seeking review in this Court, and not in any state-court proceedings. The court also did not explain how Professor Hellerstein could have protected petitioners' interests in the *Reynolds* litigation, particularly when he did not become involved in the *Reynolds* litigation until after the purported evidentiary failure that the Alabama Supreme Court saw in *Reynolds* had already occurred.

b. Alabama Supreme Court. In their appeal to the Alabama Supreme Court, petitioners challenged the Circuit Court's res judicata determination and, among other things, reiterated their Commerce Clause objections to the franchise tax. Nearly a year after the case was submitted, the Alabama Supreme Court, in a five-to-four decision, issued an order that stated in full:

> PER CURIAM.
>
> AFFIRMED. NO OPINION.
>
> See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P., and *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), cert. denied, *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

711 So.2d at 1005 (Pet. App. 1a).[9]

Though there was thus no opinion for the court, one member of the majority (Justice Maddox) attempted in a concurring opinion "to explain why" the trial court's decision should be affirmed. *Id.* In Justice Maddox's view, the critical fact was a letter that counsel for South Central Bell sent to the Circuit Court in January 1990 (after the Alabama Supreme Court had issued its decision in *Reynolds*) requesting that the court hold the case in abeyance pending final disposition of the *Reynolds* litigation. *See* 711 So.2d at 1006 (Pet. App. 3a-4a). The letter stated:

> [B]oth the taxpayer and the State Department of Revenue desire that further proceedings with regard to this appeal be held in abeyance pending a final disposition of the *Reynolds* and [*GM*] cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U.S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated.

Id.

[9] Rule 53(a) of the Alabama Rules of Appellate Procedure provides in pertinent part: "The Supreme Court . . . may affirm a judgment or order of a trial court without an opinion if the court determines: (1) That an opinion in the case would serve no significant precedential purpose; and (2) That . . . (F) [t]he court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." Pet. App. 108a.

Justice Maddox interpreted this routine abeyance request to mean "that both parties advised [the trial court] that they were going to be bound by the final decision in the *Reynolds Metals* case," 711 So.2d at 1006 (Pet. App. 4a); he therefore concluded that "the trial court did not err in holding that the decision in *Reynolds Metals* precluded the claims of these particular taxpayers," *id.* at 1007 (Pet. App. 6a). Justice Maddox gave no reason for inferring that a litigant waives the right to pursue its own case when it asks a court to hold its case in abeyance pending the disposition of another case. Nor did Justice Maddox explain how South Central Bell's action could bind the CSX taxpayers, who did not even file their lawsuits until a year after counsel for South Central Bell wrote the letter in question. And, as for this Court's decision in *Richards*, Justice Maddox observed without elaboration that "[t]he operative facts of this case relating to the Due Process Clause argument are . . . wholly different." *Id.*

In contrast, three of the four dissenting Justices joined an opinion by Justice See concluding that "the taxpayers' claims are not barred by the doctrine of res judicata." *Id.* (Pet. App. 7a).[10] The dissent observed that the doctrine simply does not apply where, as here, "we are dealing not only with different tax years, but also with different taxpayers." *Id.* at 1008 (Pet. App. 8a). The dissent further noted that "the doctrine of res judicata does not apply

[10] Justice Cook dissented without opinion.

when the judgment pleaded as an estoppel is based upon controlling decisions subsequently repudiated by supervening decisions." *Id.* That principle was applicable here, the dissent explained, because this Court "has rendered intervening decisions that repudiate the *Reynolds Metals* rationale." *Id.*

On the merits, the dissent found it "inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make of this nation a single market." *Id.* (Pet. App. 7a). The dissent noted that the domestic franchise tax applies only "to the easily manipulable base of par value," whereas the foreign franchise tax applies "to the much larger base of par value plus other items such as surplus and long-term debt." *Id.* at 1010 (Pet. App. 12a-13a). Because "[i]t is not facially apparent" that the much greater foreign tax base "merely equalizes the burden produced by the application of" the higher tax rate applicable to domestic corporations (1% vs. 0.3%), the dissent found that "the Alabama franchise tax facially discriminates against interstate commerce." *Id.* Recognizing that this Court has rejected a "de minimis" exception to Commerce Clause principles, the dissent added that "arguments over the degree of the discrimination do not affect this characterization." *Id.* (Pet. App. 13a).

The dissent was also unpersuaded by the State's defense that the discriminatory foreign franchise tax could be justified as a "compensatory tax" for other levies imposed on domestic corporations. While acknowledging that the Alabama Supreme Court had "accepted a similar argument in *Reynolds Metals*," *id.* at 1011 (Pet. App. 13a), the dissent observed that this Court "has since clarified and narrowed the definition of compensatory tax," *id.* (citing *Fulton Corp. v. Faulkner*, 516 U.S. 325, 332-33 (1996), and *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 102 (1994)).

In particular, the dissent concluded that Alabama's franchise tax failed two of this Court's criteria for a permissible "compensatory tax." *First*, the dissent stated, the State had failed to demonstrate that the "discriminatory interstate tax . . . roughly approximates, but does not exceed," the taxes on intrastate commerce for which it allegedly compensates. *Id.* (Pet. App. 13a-14a). To the contrary, the dissent noted, "the Taxpayers offer substantial evidence supporting the proposition that the foreign franchise tax exceeds any intrastate burden." *Id.* (Pet. App. 14a). *Second*, the dissent concluded that "[t]he State also fail[ed] to show that the events taxed by Alabama's intrastate taxes and the interstate tax are 'substantially equivalent.'" *Id.* (citing *Fulton*, 516 U.S. at 333, 336-38). In contrast to sales and use taxes, which are complementary because they are functionally equivalent to one another, the foreign franchise tax (a tax on a corporation's privilege of doing business in Alabama) and the domestic shares tax (a tax on a shareholder's ownership of personal property) "cannot be viewed as 'mutually exclusive proxies' for each other." *Id.* (citing *Fulton*, 516 U.S. at 333, 338-40).

SUMMARY OF ARGUMENT

Whether treated as a Commerce Clause holding, a res judicata holding, or both, the Alabama Supreme Court's "no opinion" affirmance cannot be squared with controlling decisions of this Court.[11]

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[11] The Alabama Supreme Court's order merely cited the *Reynolds* decision and Rule 53(a)(1) and (2)(F) of the Alabama Rules of Appellate Procedure. Those references can be read to suggest either a ruling on the merits of petitioners' Commerce Clause claims, or a ruling based on res judicata, or both. The court may have believed that *Reynolds* (cited only as precedent) was still good law on the merits of petitioners' Commerce Clause challenge and may thus have concluded (in the words of Rule 53(a)(2)(F)) that the trial court's "judgment" (in the sense of its result) had been "entered without an error of law." Or the court may have believed that

First, this Court's decision in *Richards v. Jefferson County* squarely forecloses the use of res judicata to bar petitioners' actions. In *Richards*, the Alabama Supreme Court, invoking state-law res judicata principles, barred a federal constitutional challenge to a state tax on the transparently meritless theory that the taxpayer plaintiffs had been adequately represented by a group of different, unrelated taxpayers who had previously challenged the same tax unsuccessfully. In its decision unanimously reversing that judgment, this Court held that barring a taxpayer challenge on such a theory offends federal due process. That holding is equally applicable here.

The distinctions to which Justice Maddox and the trial court pointed are insubstantial. Contrary to Justice Maddox's belief, one petitioner's request that the trial court hold its case in abeyance pending final resolution of the *Reynolds* litigation cannot logically be read to suggest that the requesting petitioner—let alone any of the other petitioners—agreed to be bound by the outcome of the *Reynolds* litigation. Similarly, the trial court's conclusion that petitioners are bound because they had "notice" of the *Reynolds* litigation—in the sense that they knew of its existence—is not only factually incorrect but also legally meritless: a non-party's mere awareness of pending litigation neither satisfies the minimum notice requirements of due process nor justifies encumbering the non-party with the same preclusive consequences that burden

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Reynolds (cited as a preclusive prior judgment) foreclosed petitioners' current challenge on the basis of res judicata, and that the trial court's judgment (embodying that court's res judicata holding) should be affirmed for that reason. Or the court may have believed that the trial court's judgment should be affirmed on both Commerce Clause and res judicata grounds. In the absence of an opinion expressing the views of the majority, and believing that neither ground could justify the ruling in light of this Court's decisions, petitioners challenged the Alabama Supreme Court's judgment on both grounds, and this Court granted review on each.

an actual party to the litigation. And the trial court's determination that petitioners can properly be barred because they were "adequately represented" by the *Reynolds* plaintiffs, with whom they had no connection whatsoever, is in no meaningful way different from the theory this Court expressly rejected in *Richards*.

Second, in the words of the dissenting Justices below, "it is inescapable" that Alabama's franchise tax scheme violates the Commerce Clause. The State allows domestic corporations to diminish their franchise tax liability at will simply by reducing the par value of their stock. Because the State gives foreign corporations no such control over their franchise tax liability, Alabama's franchise tax facially discriminates against foreign corporations. And the tax demonstrably discriminates in practical effect: as the trial court found, the evidence in this case proves that Alabama corporations on average pay only about one-fifth the amount of franchise tax they would pay if they were foreign corporations.

Particularly in light of this Court's recent cases, Alabama's foreign franchise tax cannot be sustained as a permissible "complementary tax" needed to compensate for a related tax burden imposed disproportionately on domestic corporations. Even if one takes account of both the domestic franchise tax and the "domestic shares tax" (for which, in combination, the State claims the foreign franchise tax compensates), domestic corporations on average still pay only about half the amount of tax they would pay if they were foreign corporations. Furthermore, the domestic shares tax cannot properly be taken into account at all under this Court's "complementary tax" rulings because it is imposed on a "taxable event" altogether different from that of Alabama's foreign franchise tax: whereas the shares tax is an *ad valorem* tax on a shareholder's ownership of shares, measured by the value of those shares, the foreign franchise tax is an

excise tax on a corporation's privilege of doing business in Alabama, measured by its actual capital employed within the State.

Accordingly, this Court should remove both the res judicata and the Commerce Clause obstacles that Alabama has unjustifiably erected to block petitioners' claims, and it should remand for the fashioning of meaningful backward-looking relief.

ARGUMENT

I. ALABAMA'S EXTREME APPLICATION OF RES JUDICATA TO BAR PETITIONERS' CONSTITUTIONAL CHALLENGE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Under no plausible theory consistent with federal due process may Alabama invoke the judgment in the *Reynolds* case—to which petitioners were complete strangers—as a res judicata bar to petitioners' Commerce Clause challenge to Alabama's franchise tax scheme. The Alabama Supreme Court's judgment, to the extent that it relies on such extreme notions of res judicata, runs headlong into this Court's recent *Richards* decision.

1. In *Richards*, the Alabama Supreme Court held that a taxpayer's suit challenging an Alabama tax under the Due Process and Equal Protection Clauses of the Fourteenth Amendment was barred by res judicata in light of an earlier decision, *Bedingfield v. Jefferson County*, 527 So.2d 1270 (1988), in which that court had rejected a similar challenge to the same tax brought by different taxpayers. Even though the *Richards* plaintiffs had not been parties to the *Bedingfield* litigation, the Alabama Supreme Court held that they were bound by that decision. According to the Alabama Supreme Court, "the taxpayers in *Bedingfield* adequately represented [the taxpayers in *Richards*] because their respective interests

were essentially identical." 517 U.S. at 796 (internal quotation marks omitted).

This Court held that setting up *Bedingfield* as a bar denied the *Richards* plaintiffs their rights under the federal due process guarantee. *See id.* at 797. At the outset, the Court reiterated the bedrock principle that the Due Process Clause generally permits state courts to hold a litigant bound by an earlier decision only if that same litigant was a party to the earlier case. *See id.* at 797-98; *see also Hansberry v. Lee*, 311 U.S. 32, 40 (1940). The Court acknowledged that the rule may be different where, for example, there is a guardian-ward or trustee-beneficiary relationship, where there is a "class or representative sui[t]," or where there is "a special remedial scheme . . . as for example in bankruptcy or probate." 517 U.S. at 798-99 (internal quotation marks omitted). But no such exception applied in *Richards*.

And the Court rejected Alabama's argument that litigants may be bound whenever they were "adequately represented" in earlier litigation. *Id.* at 799-802. The Court called "troubling" the fact that the *Richards* plaintiffs had not been provided with "any notice that a suit was pending which would conclusively resolve their legal rights." *Id.* at 799. Moreover, the Court said, even assuming that "adequate representation" could ever "cure a lack of notice," the prior proceeding would "at least have to be so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 801 (internal quotation marks omitted).

The *Bedingfield* proceeding, the Court held, simply did not anwer that description. The Court noted that the *Bedingfield* plaintiffs "did not sue on behalf of a class," that "their pleadings did not purport to assert any claim

against or on behalf of any nonparties," and that "the judgment they received did not purport to bind any county taxpayers who were nonparties." *Id.*[12] The Court therefore applied "the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." *Id.* at 804. The Court concluded that "[a] state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party," and that this "general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution." *Id.* at 805.

2. Using the *Reynolds* judgment to bar petitioners' claims is at least as "extreme [an] application of state-law res judicata principles" as was using the *Bedingfield* judgment to bar the claims in *Richards*, and it equally "violates the Federal Constitution." *Id.* at 804. As in *Richards*, none of the petitioners here was given notice that the *Reynolds* litigation "would conclusively resolve their legal rights." *Id.* at 799. Similarly, the *Reynolds* proceeding was not "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 801 (internal quotation marks omitted). Moreover, the *Reynolds* plaintiffs, like the *Bedingfield* plaintiffs, "did not sue on behalf of a class" or "purport to assert any claim . . . on behalf of any nonparties," and the *Reynolds*

[12] *See also* 517 U.S. at 802 ("Nor is there any reason to suppose that the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be to attribute to them a power that it cannot be said that they had assumed to exercise.") (internal quotation marks omitted).

judgment "did not purport to bind any . . . nonparties." *Id.*[13]

And there are no meaningful distinctions. Contrary to Justice Maddox's assertion, the letter in which South Central Bell (joined by the State Department of Revenue) asked the trial court to hold the litigation in abeyance in no way suggests that South Central Bell ever agreed, either expressly or by implication, to be bound by the *Reynolds* decision. Instead, the letter (reprinted at Pet. App. 65a-66a) was a routine effort to conserve the resources of the trial court and the parties: if this Court had granted review in *Reynolds* and had invalidated the tax on the slender record developed in that case, it would have been unnecessary for South Central Bell to develop the full record eventually assembled in this case.[14] And it is simply a mystery how South Central Bell's abeyance request can possibly be understood to foreclose the CSX taxpayers, who did not even *file* their actions until a year later. *See* 711 So.2d at 1007 (Pet. App. 5a).

Quite apart from the fact that nothing in the letter can plausibly be read to manifest any intention to bind the taxpayers to *Reynolds*, it is utterly unrealistic to impute such an intention. It would be odd enough for peti-

[13] So extreme is the application of res judicata in this case that, as explained by the dissenting opinion below, it conflicts with settled principles even under Alabama law—both because the *Reynolds* case involved tax years different from those at issue in this case and because intervening legal authority undermined the viability of the *Reynolds* judgment. *See* 711 So.2d at 1008 (Pet. App. 8a).

[14] This is precisely how the trial court—presumably in a much better position than Justice Maddox to gauge the parties' intentions—treated the letter: it in no way equated the request for abeyance with any commitment to be bound. After this Court denied certiorari in *Reynolds*, the trial court, without attaching any significance to the abeyance request, restored the case to the active docket, *see* J.A. 35, disposed of the State's motion for summary judgment, *see* Pet. App. 17a n.4, and conducted a full trial on the merits of petitioners' claims.

tioners voluntarily to bind themselves to the outcome of litigation to which they were not a party, waiving any opportunity to cure defects in the *Reynolds* record without any offsetting benefit. But the timing of the abeyance request would make this odder still. South Central Bell sent the abeyance letter *after* the Alabama Supreme Court had already rejected the *Reynolds* plaintiffs' challenges. It is inconceivable that any taxpayer would willingly have tied its fate to that of litigants who had already suffered defeat at the highest level of the Alabama court system.

The trial court's "distinctions" (not endorsed even by Justice Maddox) are equally insubstantial. As for the trial court's "notice" point, the undisputed record evidence shows that petitioners did not become aware of the *Reynolds* litigation until after the trial court's decision in that case. *See supra*, p. 12.[15] And it is neither realistic nor constitutionally tolerable to impute knowledge to petitioners merely because they are "large and sophisticated corporations." Pet. App. 18a. In any event, even if one assumed—contrary to the facts—that petitioners were aware of the pendency of the *Reynolds* litigation, mere "knowledge" of a lawsuit cannot be equated with "notice that a suit was pending which would conclusively resolve [petitioners'] legal rights." 517 U.S. at 799. As this Court stated in *Richards*, "[t]he general rule is that the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Id.* at 800 n.5 (internal quotation marks and brackets omitted).

The trial court also suggested that the *Reynolds* plaintiffs "adequately represented" petitioners, noting that

[15] Binding petitioners to the outcome in the *Reynolds* case is thus particularly offensive. In *Reynolds*, the Alabama Supreme Court based its rejection of the plaintiffs' claims on evidentiary failure. By the time petitioners learned of the *Reynolds* litigation, that purported failure had already occurred.

accomplished attorneys represented the *Reynolds* plaintiffs; that *Reynolds* arose from the "same nucleus of operative facts"; that petitioners' basic claim was "addressed and decided in *Reynolds*"; that there was no "significant lapse of time" since *Reynolds*; that the *Reynolds* plaintiffs had no "conflict of interest" with petitioners; and that the same attorney who represented the *Reynolds* plaintiffs also represented petitioners. But this "adequate representation" theory is identical to that already rejected in *Richards*: with the possible exception of the overlap of attorneys, each of these considerations applied equally in *Richards*. And to say that "[t]axpayers are represented by the same attorney" as the *Reynolds* plaintiffs significantly overstates the case: Professor Hellerstein (one of petitioners' counsel) represented the *Reynolds* plaintiffs only as co-counsel in seeking certiorari in this Court. *See* note 8, *supra*. In any event, overlap of attorneys is both legally and logically irrelevant.[16]

In sum, *Richards* controls this case, and Alabama therefore may not, consistent with the Due Process Clause of the Fourteenth Amendment, invoke res judicata principles to bar petitioners' federal constitutional challenges to the State's franchise tax scheme.

II. BY TAXING FOREIGN CORPORATIONS MORE HEAVILY THAN DOMESTIC CORPORATIONS, ALABAMA'S FRANCHISE TAX SCHEME DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

There can be no serious debate about the proper resolution of the merits of this case: Alabama's franchise tax

[16] *See generally Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 178-79 (3d Cir. 1994) (Becker, J.) ("[t]he fact that the plaintiff's attorney took part in a prior, similar action is irrelevant unless there is evidence that the plaintiff was, through his or her attorney, actually participating in the prior suit").

violates the Commerce Clause, as every judge who expressly addressed the merits of this case has concluded.[17] Both on its face and in effect, Alabama's franchise tax plainly discriminates against out-of-state corporations, and no plausible argument can be made that the complementary tax doctrine excuses this discrimination.

1. Alabama's franchise tax scheme produces a textbook violation of the Commerce Clause by "favor[ing] domestic corporations over their foreign competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996). By imposing a tax on domestic corporations measured by the par or stated value of their capital stock, Alabama permits domestic corporations effectively to determine their own franchise-tax liability, a freedom that those corporations naturally use to reduce their franchise tax payments to a minimal amount. *See* Stip. ¶¶ 21-24 (Pet. App. 52a-53a). In contrast, by imposing a tax on foreign corporations measured by actual capital employed in the State, Alabama precludes foreign corporations from doing the same. *See* Stip. ¶¶ 25-26 (Pet. App. 53a). Thus, as the dissenting opinion below properly recognized, "the Alabama franchise tax facially discriminates against interstate commerce," 711 So.2d at 1010 (Pet. App. 12a), thereby triggering the "virtually *per se* rule of invalidity" that this Court applies to facially discriminatory taxes. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of*

[17] The trial judge found that the tax violated the Commerce Clause because "the Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Pet. App. 21a-22a (footnote omitted). The three Alabama Supreme Court Justices who joined an opinion on the merits likewise concluded that "it is inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make of this nation a single market." 711 So.2d at 1008 (Pet. App. 7a). And the deafening silence of the five Justices who voted to affirm may be the surest sign that Alabama's franchise tax scheme cannot be defended against Commerce Clause attack.

Harrison, 117 S. Ct. 1590, 1598 (1997) (striking down state property-tax exemption for charitable institutions that was limited to institutions serving principally state residents); *Fulton*, 516 U.S. at 331 (invalidating property tax on "intangibles" that taxed corporate stock only to the extent that the issuing corporation engaged in out-of-state activity); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 100 (1994) (condemning tax on in-state disposal of out-of-state waste that was higher than tax on in-state disposal of in-state waste).

The facial discrimination that infects Alabama's taxing scheme is no less manifest merely because foreign and domestic corporations pay franchise taxes at different rates and on different bases. The essential nature of the discrimination that is apparent on the face of the statute is that Alabama law permits domestic corporations to pay a tax on a base of their own choosing while compelling foreign corporations to pay a tax on a base determined by their business activities in the State. It is simple logic that a tax, whatever its rate or base, always favors those who are free to determine their own tax liability over those who are not.

In any event, the discrimination that is plain on the face of Alabama's franchise tax statute is fully borne out in its application. As the trial court found, domestic corporations, if they had been incorporated in any other State, on average would have been saddled with a franchise tax burden more than five times greater than what they actually paid. *See* Statement 24 (Pet. App. 36a). The percentage of discrimination ranged from 409.56% in 1988 to 509.15% in 1991, with domestic corporations paying between $39 million and $46 million less in Alabama franchise tax than they would have paid had they been treated as foreign corporations. *See id.*[18] It follows

[18] Put another way, the effective tax rate for the average domestic corporation in 1988-1991 was less than $0.60 per $1,000 of capital employed in Alabama, whereas the effective tax rate for foreign

that Alabama's franchise tax "in its practical operation work[s] discrimination against interstate commerce," *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940), and therefore violates the Commerce Clause prohibition on state taxes that have a "discriminatory effect," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

The trial court's factual determination that petitioners "clearly and abundantly demonstrate[d]" that Alabama's "franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation" (Pet. App. 21a-22a) is not impeached by respondents' "as if domestic" study, which supposedly revealed that petitioners would have paid more taxes as domestic corporations than they paid as foreign corporations. *See* Br. in Opp. 10, App. The substantial "as if domestic" tax that petitioners purportedly would have paid resulted only because petitioners, not being Alabama corporations, have never had any reason to assign an artificially low par value to their stock. If petitioners had incorporated in Alabama, they would obviously have had every reason to minimize the par value of their stock, *see* note 6, *supra*—just as Alabama corporations do as a matter of course, *see* Stip. ¶¶ 21-24 (Pet. App. 52a-53a); Statement 17 & n.20, 38 (Pet. App. 30a, 46a-47a); J.A. 76-77, 110-11. Respondents' study thus cannot be taken seriously: it inconsistently treats petitioners as if they *are* Alabama corporations, but not as if they *act like* Alabama corporations.

Nor is it any antidote to the patent discrimination in the Alabama taxing scheme that foreign corporations can avoid it "by reducing the capital they employ in Alabama," Br. in Opp. 12—*i.e.*, by limiting their business activities within the State. Forcing taxpayers to choose between subjecting themselves to a discriminatory tax or

---

corporations in those years was $3.00 per $1,000 of capital employed in Alabama. *See* Statement 24-25 (Pet. App. 36a).

deploying their resources to avoid the exaction plainly "forecloses tax-neutral decisions" (*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977)), thereby undermining our national common market. This Court has specifically held that a victim's ability to circumvent discrimination by yielding to its illicit incentives cannot save an impermissibly discriminatory tax. *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 78 (1992) (there is "no authority for the . . . proposition . . . that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business").

2. In light of the clear discrimination worked by Alabama's franchise tax (both by its terms and in its effect), the only remaining question is whether the discriminatory levy may be rescued from constitutional attack on the theory—seized upon by the *Reynolds* court, *see* 558 So.2d at 386—that it is a so-called "complementary" or "compensatory" tax needed to offset some burden imposed disproportionately on intrastate commerce. The answer to that question, under this Court's decisions, is by now entirely free from doubt: the compensatory tax defense cannot save Alabama's discriminatory franchise tax from condemnation under the Commerce Clause.

This Court has observed that "use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine." *Oregon Waste*, 511 U.S. at 105. And an unbroken line of decisions over the past two decades reflects the Court's "recent reluctance to recognize new categories of compensatory taxes." *Id.*; *see Fulton Corp. v. Faulkner*, 516 U.S. 325 (discriminatory intangible property tax not complementary to state corporate income tax); *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994) (discriminatory statewide use tax not complementary to local sales

taxes); *Oregon Waste*, 511 U.S. 93 (discriminatory tax on in-state disposal of out-of-state waste not complementary to general taxes on intrastate commerce); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (discriminatory flat taxes on out-of-state trucks not complementary to other taxes on in-state trucks); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (discriminatory tax on out-of-state wholesalers not complementary to tax on local manufacturers); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (discriminatory use tax on natural gas not complementary to local severance tax).

In a series of decisions handed down after *Reynolds*, this Court has carefully delineated the scope of the compensatory tax doctrine, articulating three requirements that must be met before a court may excuse otherwise unconstitutional discrimination: (1) the State must identify an intrastate tax burden for which the discriminatory tax attempts to compensate; (2) the tax on interstate commerce must roughly approximate—but not exceed—the amount of the tax on intrastate commerce; and (3) the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent," *i.e.*, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Oregon Waste*, 511 U.S. at 103; *Associated Indus.*, 511 U.S. at 648; *Fulton*, 516 U.S. at 332-33.

The State cannot tenably defend its foreign franchise tax under this test: even assuming for the sake of argument that the domestic shares tax could qualify as an intrastate tax burden for which the discriminatory franchise tax purports to compensate,[19] the State cannot satisfy

[19] Even this assumption is tenuous: there is no indication whatsoever that the Alabama legislature enacted the foreign franchise tax to balance any burden imposed by the domestic shares tax. That conclusion is reinforced by the fact that Alabama imposes a *foreign* shares tax that closely parallels the domestic shares tax. *See* Ala. Code § 40-11-1(b)(9). Like its domestic counterpart, the foreign

either of the latter two criteria. *First*, even if one takes account of the domestic shares tax, domestic corporations on average still pay in franchise tax and domestic shares tax combined only about half the amount they would pay in franchise tax alone if they were incorporated outside of Alabama. *See* Statement 25 (Pet. App. 36a-37a). The tax on interstate commerce therefore cannot "be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce." *Oregon Waste*, 511 U.S. at 103. Rather, as in *Associated Industries*, "[t]he resulting disparity is incompatible with what [this Court has] termed the 'strict rule of equality adopted in [*Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)].'" 511 U.S. at 649.

Second, the domestic shares tax and the foreign franchise tax are not imposed on substantially equivalent events. The shares tax is an *ad valorem* personal property tax (much like a property tax on real estate): it taxes a shareholder for the privilege of owning stock in an Alabama corporation, and it is measured by the value of those stock holdings. In contrast, the franchise tax is an excise tax: it taxes the corporation (not the shareholder) for the privilege of doing business in Alabama, and it is measured by the amount of capital employed in Alabama. *Compare* Ala. Code § 40-14-70 *with* Ala. Code § 40-14-41. Alabama thus imposes the two levies not only on different events, but also on different taxpayers and different tax bases. Accordingly, the foreign franchise tax and the domestic shares tax cannot be viewed as complementary because the two taxes are not "sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Oregon Waste*, 511 U.S. at 103 (internal quotation marks and brackets omitted); *see also*

shares tax is an *ad valorem* tax imposed on shareholders (not corporations), and is collected by county governments (not the State). *See generally* Statement 22 (Pet. App. 34a). Thus, to the extent that there were any need to balance the domestic shares tax, the need would be fully met by the foreign shares tax.

Fulton, 516 U.S. at 340 n.6 ("incidence upon the same class of taxpayers is a necessary condition for a finding that two taxes are complementary").[20]

In sum, Alabama's franchise tax scheme—both facially and in effect—discriminates against interstate commerce, and the compensatory tax doctrine cannot save the scheme from invalidation under the Commerce Clause.

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[20] The Court therefore need not reach the related question whether the domestic franchise tax could qualify as "sufficiently similar in substance" to the foreign franchise tax even though it is both imposed on a different event and measured by a different base.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed. The case should be remanded for further proceedings, including the provision of meaningful backward-looking relief.[21]

Respectfully submitted,

WALTER HELLERSTEIN
UNIVERSITY OF GEORGIA
LAW SCHOOL
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

November 10, 1998

* Counsel of Record

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[21] *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

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In The

Supreme Court of the United States

October Term, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL.,

Petitioners,

v.

STATE OF ALABAMA AND STATE DEPARTMENT OF REVENUE,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF FOR RESPONDENTS

BILL PRYOR
Attorney General
RON BOWDEN
DAN E. SCHMAELING
Assistant Attorneys General
State of Alabama
P.O. Box 320001
Montgomery, AL 36132
(334) 242-7300

CHARLES J. COOPER*
MICHAEL W. KIRK
DAVID H. THOMPSON
COOPER CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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JURISDICTION

As explained in parts I and II of the Argument, this Court lacks jurisdiction over this case both because the Alabama Supreme Court lacked jurisdiction over petitioners' claims against respondents and because the Eleventh Amendment precludes this Court from exercising jurisdiction over the State of Alabama and its Department of Revenue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in relevant part: "[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Title 28, Section 1257(a) of the United States Code provides in relevant part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . ."

STATEMENT

Petitioners' description of Alabama's corporate franchise tax and their factual account of the proceedings below are unobjectionable, *see* Pet. Br. at 3-17, and we will not unnecessarily lengthen this response by recounting that background. We must reiterate one fact noted by petitioners, however, for its dispositive jurisdictional significance has heretofore been overlooked, not only by petitioners, but by the Alabama Supreme Court and by,

we regret to acknowledge, respondents as well. The only parties opposite petitioners in the Alabama Supreme Court were the State of Alabama and the Alabama Department of Revenue; no state official was a party before the Alabama Supreme Court,[1] as petitioners acknowledge. Pet. Br. at ii. Likewise, under this Court's Rule 12.6, the only respondents before this Court are the State and its Department of Revenue, as petitioners also acknowledge on the face of their filings.

As we demonstrate at length below, this Court lacks jurisdiction over respondents in this case, for two independent reasons. First, it is clear from the plain language of the Alabama Constitution, as well as the Alabama Supreme Court's uniform decisions interpreting it, that the Alabama Supreme Court itself lacked jurisdiction over this case, for the only appellees before it had not waived, and could not waive, their sovereign immunity from suit in any court. Because the Alabama Supreme Court lacked jurisdiction to enter judgment in this case, it follows that this Court likewise lacks jurisdiction to

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[1] Although five of the ten consolidated actions filed by petitioners in the Circuit Court of Montgomery County named the Commissioner of the Alabama Department of Revenue as well as the State and the Department itself, petitioners' notice of appeal to the Alabama Supreme Court designated only the State of Alabama and the Alabama Department of Revenue as appellees. Record 2265. Likewise, the docketing statement signed by petitioners' counsel below designated the "part[ies] appealed against" as the "State of Alabama, State Department of Revenue." Record 2268. Accordingly, the judgment in favor of the Commissioner was not appealed, and the State and the Department of Revenue were the only parties, apart from petitioners, before the Alabama Supreme Court. *See, e.g., Sperau v. Ford Motor Co.*, 674 So. 2d 24, 40 (Ala. 1995) ("[I]t is settled law that a notice of appeal from a judgment in favor of two or more parties must specifically name each party whose judgment the appellant wishes to overturn."), *vacated on other grounds*, 517 U.S. 1217 (1996).

review that judgment. Accordingly, the Court should dismiss the writ of certiorari issued in this case for lack of jurisdiction or as improvidently granted.

Second, quite apart from whether the Alabama Supreme Court had jurisdiction over this case, we respectfully submit that the very letter of the Eleventh Amendment precludes this Court from construing the judicial power of the United States (including this Court's appellate jurisdiction) to extend to any suit (including this suit) commenced and prosecuted against one of the United States (including Alabama), by citizens of another State (including petitioners, all of whom are incorporated in states other than Alabama). The Court's contrary decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), was "patent error," in the recent words of four Justices of the Court, and should be overruled.

With respect to petitioners' claim that the Alabama Supreme Court invoked the doctrine of *res judicata* to bar their Commerce Clause challenge to the Alabama corporate franchise tax, petitioners acknowledge that the Alabama Supreme Court majority's citation to *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990), "can be read to suggest either a ruling on the merits of petitioners' Commerce Clause claims, or a ruling based on *res judicata*, or both." Pet. Br. 17 n.11. We read the majority's reference to the *Reynolds Metals* decision as a ruling on the merits of petitioners' constitutional claims, and so we offer no defense of the decision as a valid application of the doctrine of *res judicata*.

With respect to the merits, the flaw in petitioners' claim lies not in the application to Alabama's corporate franchise tax of this Court's recent negative Commerce Clause cases; the flaw lies rather in the negative Commerce Clause cases themselves. If the Court, contrary to our submission, finds that it has jurisdiction over this case, we respectfully request that it formally reconsider its negative Commerce Clause jurisprudence. We fully

grasp the gravity of this request, and we do not make it lightly. But our arguments are well known to the Court, for the textual, historical, and analytical problems with the negative Commerce Clause have been acknowledged by many Members of the Court, both past and present, and by a wealth of scholarly commentary. The short of our argument is this: under our constitutional scheme of concurrent regulatory power over interstate commerce, Alabama is sovereign over her own corporate franchise taxes – until *Congress* says otherwise. The Commerce Clause says nothing more; the Supremacy Clause requires nothing more, and this Court can demand nothing more.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to consider the merits of this case because respondents are absolutely immune from suit pursuant to Article I, Section 14 of the Alabama Constitution. "Under this provision, the State and its agencies have absolute immunity from suit in *any* court." *Ex parte Franklin County Dep't of Human Resources*, 674 So. 2d 1277, 1279 (Ala. 1996) (emphasis added). Thus, the Alabama Supreme Court lacked jurisdiction over petitioners' claims against respondents – the State and the Department of Revenue. As it is settled that the State's absolute immunity is both jurisdictional and not waivable, "a trial court or an appellate court should, at any stage of the proceedings, dismiss a suit when it becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution." *Aland v. Graham*, 250 So. 2d 677, 678 (Ala. 1971). Because the Alabama Supreme Court clearly lacked jurisdiction over the merits of petitioners' claims against respondents, this Court likewise lacks jurisdiction over this case. Indeed, any opinion rendered by this Court would necessarily be advisory for even if the Court accepted petitioners' claims on the merits and remanded the case to the Supreme Court of Alabama for further proceedings on remedy (as petitioners request, *see* Pet. Br. at 33), the Supreme Court of Alabama could not

provide any relief, as it would be obliged to dismiss for want of jurisdiction.

2. The Eleventh Amendment precludes this Court from exercising jurisdiction over the State of Alabama and the State Department of Revenue, the sole respondents before the Court. In *McKesson Corp.*, 496 U.S. at 31, this Court held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." The Court's decision in *McKesson* is irreconcilable with the plain language of the Eleventh Amendment, which prohibits the exercise of federal "judicial power" over a state in *any* suit commenced by an out-of-state party. Clearly, this Court's review of state court judgments constitutes an exercise of the "judicial power of the United States."

Moreover, the principal authority upon which the Court relied in *McKesson*, Chief Justice Marshall's opinion in *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821), *undermines* rather than supports the Court's holding. Specifically, *Cohens* held that a suit commenced *by* a state is not within the Eleventh Amendment because "[n]othing is demanded from the state. No claim against it is asserted or prosecuted." *Id.* at 410. The Court made clear, however, that a writ of error to the Supreme Court, like a petition for certiorari, would constitute a "suit" under the Eleventh Amendment "when it is to restore the party who obtains it to the possession of anything which is withheld from him. . . . " *Id.* at 409-10. Petitioners' demand here for a refund of taxes paid to the State of Alabama plainly falls squarely within Chief Justice Marshall's understanding of a suit within the meaning of the Eleventh Amendment.

As both the text of the Eleventh Amendment and the Court's decision in *Cohens* foreclose this Court from asserting jurisdiction over a suit commenced against a state, it is hardly surprising that four members of this Court have characterized the reasoning of *McKesson* as "specious." *Seminole Tribe v. Florida*, 517 U.S. 44, 113 n.10

(1996) (Souter, J., dissenting). This Court should close the exception to the Eleventh Amendment carved out by *McKesson* and thereby preserve the "constitutionally mandated balance of power between the States and the Federal Government" that the Eleventh Amendment serves to maintain. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (internal quotations omitted).

3. The text and structure of Article I, as this Court recognized early on, provide ready means for determining when a power granted to Congress may not be exercised concurrently by the states, and there can be no doubt that the states have retained the power to regulate commerce, especially as it is understood today, subject to the Supremacy Clause. The genesis and history of the Court's negative Commerce Clause jurisprudence show that it ultimately rests on the theory that the regulations of commerce set forth in this Court's cases were not ordained by the Constitution itself, but rather were silently "enacted" by Congress. The Court has acknowledged as much in those instances where Congress has overruled or revised specific Commerce Clause decisions of the Court.

The Court's indisputable decisions withdrawing its own regulations of commerce in favor of those enacted by Congress in such cases reveal that the Court's commercial rules are not found in the Constitution (for if they were, Congress could not amend them). Nor may they be considered Acts of Congress, notwithstanding the Court's suggestion that "the inaction of congress was in itself the equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states," *In re Rahrer*, 140 U.S. 545, 562 (1891), because the Constitution's "finely wrought" procedures of Article I, Section 7 have not been observed. *INS v. Chadha*, 462 U.S. 919, 951 (1983). If the commercial regulations set forth in the Court's cases cannot be found in either the Constitution or the laws enacted by Congress, this Court lacks the power to prescribe them. Just as "[t]here is no provision

in the Constitution that authorizes the President to enact, to amend, or to repeal statutes," *City of New York v. Clinton*, 118 S. Ct. 2091, 2103 (1998), the Framers did not grant such authority to the Judiciary.

The doctrine of *stare decisis* does not counsel against restoring the structure established by the Framers. First and foremost, the negative Commerce Clause doctrine, we respectfully submit, represents " 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make [the Court] hesitate to correct.' " *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79, 80 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Moreover, a decision announcing that the Court will no longer invalidate state laws that do not conflict with Acts of Congress would have, at most, a minimal impact upon settled expectations.

ARGUMENT

I. BECAUSE THE ALABAMA SUPREME COURT LACKED JURISDICTION OVER PETITIONERS' CLAIMS AGAINST RESPONDENTS, THIS COURT LACKS JURISDICTION AS WELL.

1. Section 14 of Article I of the Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law." The Alabama Supreme Court has consistently held that "[u]nder this provision, the State and its agencies have absolute immunity from suit in *any* court." *Ex parte Franklin*, 674 So. 2d at 1279 (emphasis added).[2] It likewise has long been

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[2] *See also, e.g., Alabama State Docks v. Saxon*, 631 So. 2d 943, 946 (Ala. 1994) ("This Court has recognized the almost invincible wall of the state's immunity, as established by the people through their Constitution.") (citations and internal

settled that this immunity is jurisdictional. "We have held that the circuit court is without jurisdiction to entertain a suit against the State because of Sec. 14 of the Constitution." *Aland*, 250 So. 2d at 678 (citation omitted). And the Alabama Supreme Court "will take notice of the question of jurisdiction at any time or even *ex mero motu*." *Id.* Nor can the state's immunity be waived. "It is familiar law in this state that § 14 'wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state.' . . . Therefore, it is clear that neither the legislature nor [a state agency] had the power to waive, either expressly or impliedly, the state's immunity under § 14." *Alabama State Docks v. Saxon*, 631 So. 2d 943, 946 (Ala. 1994) (citations omitted); *see also Williams v. Hank's Ambulance Serv.*, 699 So. 2d 1230, 1232 (Ala. 1997); *Gunter v. Beasley*, 414 So. 2d 41, 48 (Ala. 1982).

This Court too has recognized the inability of the state or any of its officers to waive the sweeping immunity that the Alabama Constitution accords to the State and its agencies. Indeed, in *Alabama v. Pugh*, 438 U.S. 781, 782 (1978), the Court held that the Eleventh Amendment required that the State and the Department of Corrections be dismissed from a federal court suit, noting that "it appears that no consent [to suit] could be given under Art. I, § 14 of the Alabama Constitution." *See also Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 194 (1964) (noting "state cases holding that neither the legislature nor a state officer has the power to waive the State's immunity").

In sum, "a trial court or an appellate court should, at any stage of the proceedings, dismiss a suit when it

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quotations omitted); *Mitchell v. Davis*, 598 So. 2d 801, 806 (Ala. 1992); *Unzicker v. State*, 346 So. 2d 931, 933 (Ala. 1977) ("To the extent that the State of Alabama is impleaded as a defendant in this action, the action is prohibited by the Constitution.").

becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution." *Aland*, 250 So. 2d at 678. As demonstrated previously (*supra*, at 1-2), the State of Alabama and its Department of Revenue were the only appellees before the Alabama Supreme Court and are, therefore, the only respondents in this Court. Thus, the Alabama Supreme Court lacked jurisdiction to hear petitioners' claims against respondents,[3] and it necessarily follows that this Court lacks jurisdiction as well.

2. If an inferior court whose judgment is under review lacked jurisdiction to decide the substantive legal issue in dispute, the reviewing court necessarily also lacks appellate jurisdiction to decide the cause. Just last Term, this Court reiterated:

> [E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining this suit.

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[3] The trial court *did* have jurisdiction over petitioners' claims against the Commissioner of the Department of Revenue under the well-established exception to Article I, Section 14, similar to this Court's *Ex parte Young*, 209 U.S. 23 (1908), exception to Eleventh Amendment immunity, for actions brought against state officers. *E.g.*, *Williams*, 699 So. 2d at 1232 (describing state officer exceptions). However, as noted previously, petitioners did not appeal the trial court's judgment in favor of the Commissioner to the Alabama Supreme Court.

Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1013 (1998) (citations and internal quotations omitted); *see, e.g., Jackson v. Ashton*, 8 Pet. (33 U.S.) 148, 148 (1834) (Marshall, C.J.) ("[I]t is the opinion of this court, that the said circuit court could not entertain jurisdiction of this cause, and that, consequently, this court has not jurisdiction in this cause, but for the purpose of reversing the decree of the said circuit court, entertaining said jurisdiction.").[4]

The same rule regarding jurisdiction over the merits of a dispute obtains in cases coming to this Court from state courts. *See, e.g., Palmer v. Ohio*, 248 U.S. 32, 33-34 (1918) (dismissing for want of jurisdiction where state court lacked jurisdiction by virtue of State's sovereign immunity); *Callan v. Bransford*, 139 U.S. 197, 198 (1891) (where state court of appeals dismissed for lack of "jurisdiction under the constitution of the state . . . we are of the opinion that the writs of error to that court must be dismissed"); *Smith v. Adsit*, 16 Wall. (83 U.S.) 185, 189-90 (1872); *Semple v. Hagar*, 4 Wall. (71 U.S.) 431, 434-35 (1866); *Beers v. Arkansas*, 20 How. (61 U.S.) 527, 530 (1857) ("writ of error must . . . be dismissed, for want of jurisdiction in this court" where state court lacked jurisdiction by virtue of state's sovereign immunity); *President & Dirs. of Bank of Washington v. Arkansas*, 20 How. (61 U.S.) 530, 532 (1857) (same).[5]

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[4] Of course, in cases coming from state supreme courts, this Court lacks the power to review and correct jurisdictional determinations actually made in the court below. Had the jurisdictional defect in this case been raised and passed upon by the Alabama Supreme Court, its determination would have been binding.

[5] The Court's decision in *General Oil Co. v. Crain*, 208 U.S. 211, 226-27 (1908), (assuming that it was not overruled in *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949); *see Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2057 n.14 (1997) (Souter, J., dissenting)), has no application here. That case held as a matter of federal due process that a state may not confer

The requirement that an appellate court must satisfy itself that the lower courts' jurisdiction has been established " 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Steel Co.*, 118 S. Ct. at 1012 (citations omitted). This Court aptly described the essence of jurisdiction 160 years ago:

> Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction. . . .

Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 718 (1838).

If the court below lacked jurisdiction, its action was thus "extra-judicial"; it acted "without the authority of law, to render a judgment or decree upon the rights of the

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immunity on both the State and its officers because plaintiffs would thereby be deprived of any state forum to redress federal constitutional claims. As Justice Souter has pointed out, Alabama (like the other 49 states) provides a state official exception similar to this Court's *Ex parte Young* doctrine to the State's sovereign immunity. *Coeur d'Alene*, 117 S. Ct. at 2057 n.15 (Souter, J., dissenting) (citing *Aland*, 250 So. 2d at 679). Indeed, Alabama goes further than *Ex parte Young* in that it permits suits against state officials seeking an order requiring "the ministerial act of refunding tax money. . . . " *Williams*, 699 So. 2d at 1237. Thus, petitioners in this case had available to them a state forum with authority to provide both prospective and retrospective relief had they prevailed on their claims against the Commissioner of Revenue. As noted above, petitioners did not appeal the judgment entered by the trial court in favor of the Commissioner.

litigant parties." In that event, there is no legal "judgment," *see* 28 U.S.C. § 1257(a), to be reviewed by this Court in the exercise of its "appellate Jurisdiction" because such a judgment has always been understood to be void. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 n.10 (1982) ("It is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over the relevant parties. One State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State.").

3. That respondents failed to bring this jurisdictional defect to the attention of the Alabama Supreme Court cannot provide this Court with jurisdiction it otherwise lacks.[6] " 'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' " *Steel Co.*, 118 S. Ct. at 1012 (citations omitted). Thus, federal courts, including this Court, must "presume that

[6] We regretfully acknowledge that respondents, in addition to failing to present the issue below, failed to note the jurisdictional defect in their Brief in Opposition to the Petition for Certiorari, notwithstanding the requirements of this Court's Rule 15.2. Still, the issue cannot be avoided, as it is jurisdictional. *See Adams v. Robertson*, 117 S. Ct. 1028, 1032 n.5 (1997) ("Respondents' obligation to object under Rule 15.2 was not diminished by the fact that their objection may have been based on this Court's jurisdiction, *see supra*, at 1031, and thus nonwaivable.").

[they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations and internal quotations omitted).

Indeed, any opinion rendered by this Court would necessarily be advisory, for even if the Court accepted petitioners' claims on the merits and remanded to the Supreme Court of Alabama for further proceedings on remedy (as petitioners request, *see* Pet. Br. at 33), the Supreme Court of Alabama could not provide any relief as it would be obliged to dismiss for want of jurisdiction. *See, e.g., Aland*, 250 So. 2d at 678 ("[A] trial court or an appellate court should, at *any stage of the proceedings*, dismiss a suit when it becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution.") (emphasis added). This Court has recognized this reality in the analogous context of its independent and adequate state grounds jurisprudence:

> "[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *see also California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J., Circuit Justice) ("Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory grounds.").[7]

[7] It is for this reason that the "plain statement" presumption of *Michigan v. Long*, 463 U.S. 1032 (1983), has no

In sum, the Alabama Constitution and the Alabama Supreme Court's consistent decisions interpreting it leave no room for doubt that the Alabama Supreme Court lacked jurisdiction over respondents. It follows that this Court likewise lacks jurisdiction to consider the merits of petitioners' claims. We therefore submit that the Court may properly dismiss the writ of certiorari for want of jurisdiction, *see, e.g., Webb v. Webb*, 451 U.S. 493, 501-02 (1981); *see also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE 142 (7th ed. 1993) (citing cases), notwithstanding its traditional reluctance to resolve issues of state law. Alternatively, the Court may simply wish to dismiss the writ as improvidently granted to avoid adjudicating a question of state law.[8]

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application here. Presuming state court jurisdiction under this rule would be no different than exercising the "hypothetical jurisdiction" condemned last Term in *Steel Co.* It likewise would "produce nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion. . . . " 118 S. Ct. at 1016. Because the issue was never presented to the Alabama Supreme Court, it had no opportunity to issue a "plain statement" grounding its disposition in its lack of jurisdiction over respondents. As explained in the text, there can be no question that the Alabama Supreme Court must dismiss this case for lack of jurisdiction at the first opportunity on remand, thereby rendering advisory any opinion of this Court on the merits.

[8] Alternatively, if the Court has any question concerning the application of Article I, Section 14 in this case, and wishes to inquire further into the matter rather than dismissing the writ as improvidently granted, the Court could remand the case to the Supreme Court of Alabama to address this jurisdictional issue in the first instance.

II. THE ELEVENTH AMENDMENT PRECLUDES THIS COURT FROM EXERCISING JURISDICTION OVER THE STATE OF ALABAMA AND THE ALABAMA DEPARTMENT OF REVENUE.

Quite apart from the question whether the Alabama Supreme Court had jurisdiction to enter the judgment under review, we submit that the Eleventh Amendment precludes the exercise of this Court's appellate jurisdiction over this case. Although this issue was not raised in respondents' opposition to the petition for writ of certiorari, Alabama has not waived its Eleventh Amendment rights. It is well-established that a state's waiver of its Eleventh Amendment rights must be "unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Accordingly, this Court has repeatedly held that a State that fails to raise a claim of Eleventh Amendment immunity in either federal district court or in a federal court of appeals has not waived its Eleventh Amendment rights.[9]

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[9] *See, e.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945) ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."); *Pugh*, 438 U.S. at 783 n.1 (" 'The Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court. . . . ' ") (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)). *Cf. Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982) (although state had failed to raise Eleventh Amendment in district court pleadings, state agency was not precluded "from raising its Eleventh Amendment claim on remand" from this Court). Moreover, this Court has held "that no consent could be given under Art. I, § 14, of the Alabama Constitution, which provides that 'the State of Alabama shall *never* be made a defendant in *any* court of law or equity.' " *Pugh*, 438 U.S. at 782 (emphasis added). Likewise, the Alabama Supreme Court has

The Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This Court, recognizing that behind the words of the Eleventh Amendment is "the postulate that States of the Union . . . shall be immune from suits, without their consent," has never been willing to "assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States." *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934)). Thus, this Court has interpreted the Eleventh Amendment to immunize a non-consenting state against suits brought by its own citizens and by foreign nations. *See Hans v. Louisiana*, 134 U.S. 1 (1890) (state immune from suit by its own citizen); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (state immune from suit by foreign nation).

This case, however, falls squarely within the very letter of the Eleventh Amendment. The term "any suit" certainly embraces this suit; this suit is against Alabama, which is certainly "one of the United States"; the suit was commenced and prosecuted by petitioners, all of whom are certainly "citizens of another State";[10] and the

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squarely held that this constitutional provision precludes the State from waiving its sovereign immunity under any circumstances. *See, e.g., Williams*, 699 So. 2d at 1232 (" '[N]either the State nor any individual can consent to a suit against the State.' ") (quoting *Gunter*, 414 So. 2d at 48 (internal citations omitted)).

[10] Each of the petitioners is a corporation incorporated under the laws of states other than Alabama. *See* Pet. Br. at 2. This Court long ago decided that a corporation is a "citizen," as that term applies under the Constitution, of the State that

"Judicial power of the United States" certainly includes the appellate judicial power of this Court. Therefore, if this Court construes its appellate judicial power to extend to this suit, it will be doing precisely – *precisely* – that which the Eleventh Amendment unequivocally forbids.

Despite the clarity of the amendment's language, this Court in *McKesson v. Division of Alcoholic Beverages*, 496 U.S. at 31, held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." More recently, four Members of the Court, noting that "the Amendment's unconditional language ('shall not be construed') makes no distinction between trial and appellate jurisdiction," dismissed as "specious" the *McKesson* Court's reasoning that "an appeal is not a 'suit' for purposes of the Amendment." *Seminole Tribe*, 517 U.S. at 113 & n.10 (Souter, J., dissenting). As these Justices noted, "[w]hether or not an appeal is a 'suit' in its own right, it is certainly a means by which an appellate court exercises jurisdiction over a 'suit' that began in the courts below." *Id.* at 113 n.10.

An examination of *McKesson* reveals that this criticism is well-taken.[11] According to the *McKesson* Court,

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created it. *See Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 248 (1905) ("It has long been settled that a corporation will be treated . . . as a citizen of the state under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States, to controversies between citizens of different states.") (citations omitted). The Eleventh Amendment has since then barred suits by foreign corporations, as citizens of other states, against a defendant state. *E.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Lankford v. Platte Iron Works Co.*, 235 U.S. 461 (1915) (dismissing suit by plaintiff, "a Maine corporation and a citizen of that state," against Oklahoma State Banking Board).

[11] Several commentators have noted the conflict between this Court's exercise of appellate jurisdiction over states named as defendants in state court actions and the Court's long-

the wellspring of its decision was Chief Justice Marshall's opinion in *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821). *Cohens*, however, actually undermines rather than supports the decision in *McKesson*.

In that case, the State of Virginia commenced a suit against two Virginia residents who had allegedly violated that state's anti-gambling law by selling lottery tickets. The state courts rejected the individuals' defense that federal law specifically permitted their activity. The defendants subsequently filed a writ of error in the United States Supreme Court seeking review of the federal question they had raised.[12] In considering whether the Eleventh Amendment prevented this Court from exercising appellate jurisdiction over the State of Virginia, Chief Justice Marshall stated that the Amendment "was intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union." 6 Wheat. (19 U.S.) at 407.

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standing conclusion that the Eleventh Amendment bars federal question cases. *See, e.g.*, Vicki Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 11-12.

[12] Chief Justice Marshall initially considered whether the Supreme Court had jurisdiction over the case under Article III "as the constitution originally stood" prior to ratification of the Eleventh Amendment. 6 Wheat. (19 U.S.) at 405. The Court concluded that it was "authorized to decide all cases of every description, arising under the constitution or laws of the United States." *Id.* at 382. The Court explained that "[f]rom this general grant of jurisdiction, no exception is made of those cases in which a State may be a party" and thus the Court had jurisdiction "whoever may be the parties" to a case arising under the Constitution. *Id.* at 382-83. Chief Justice Marshall then turned his attention to an analysis of the effect of the Eleventh Amendment on the Court's jurisdiction under Article III.

Having identified the core purpose of the amendment, the Court considered the question whether a writ of error constituted a "suit" within the meaning of the Eleventh Amendment. The term "suit," according to Chief Justice Marshall, means "the prosecution, or pursuit, of some claim, demand, or request." *Id.* at 407. And, "[t]o commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand." *Id.* at 408. It followed, therefore, that "a suit commenced by an individual against a state" is, simply, "process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court." *Id.*

Applying these principles to the case before it, the Court in *Cohens* concluded that

> this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State.

Id. at 409. Chief Justice Marshall elaborated further:

> Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. *Nothing is demanded from the State. No claim against it of any description is*

> *asserted or prosecuted. The party is not to be restored to the possession of any thing. . . .*

Id. at 410 (emphasis added).

The *Cohens* case, therefore, stands for the simple and seemingly obvious proposition that a suit commenced by a state against an individual is not a suit commenced by an individual against a state, and the former does not somehow become the latter if the individual defendant seeks review in this Court of a constitutional defense.[13]

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[13] It is noteworthy that Chief Justice Marshall's conclusion – that the Eleventh Amendment bars the exercise of federal judicial power, including this Court's appellate power, over a suit commenced by an individual against a state, but not over a suit commenced by a state against an individual – is entirely in keeping with Marshall's earlier view, expressed in the Virginia ratifying convention, that the Diversity Clause of Article III would itself have precisely the same effect. At the convention, somewhat in tension with the analysis of Article III in *Cohens*, *see supra* at 18 n.12, Marshall had denied that out-of-state citizens could bring suits in federal court against the states, contending that the intent of the Diversity Clause was, rather, "to enable States to recover claims of individuals residing in other States." 3 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 555 (2d ed. 1836) (John Marshall, Virginia Convention). With respect to the complaint that such a construction would render the Diversity Clause a one-way-street, Marshall noted that the states' sovereign immunity made it unavoidable:

> It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account?

Id. Thus, Marshall apparently believed that the Eleventh Amendment simply restored to the states the sovereign immunity from federal suits that they enjoyed before the Court's decision in *Chisolm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), which held that the Diversity Clause grants federal jurisdiction over a suit brought against a state by a non-citizen.

Not only was the suit brought by Virginia in *Cohens* plainly outside the language of the Eleventh Amendment, it was equally plainly outside the purpose of the amendment. A state needs no sovereign immunity when it *commences* a lawsuit, for "[n]othing is demanded from the State." *Id.*

By the same token, a suit, like the instant suit, commenced by non-citizen plaintiffs against a state is plainly within the language and purpose of the Eleventh Amendment, and such a suit is not somehow transformed into something else when the plaintiffs seek review of the case in this Court. To paraphrase *Cohens*, something *is* demanded of the state; a claim *is* asserted against it, and the plaintiff *does* seek to be restored to the possession of some thing, in this Court no less than in the state courts. Indeed, Chief Justice Marshall said as much: "A writ of error . . . is in the nature of a suit or action when it is to restore the party who obtains it to the possession of something which is withheld from him. . . . " *Id.* at 409-10. Thus, for the very reasons that the suit before the Court in *Cohens* was not barred by the Eleventh Amendment, the petitioners' suit here plainly is.[14]

The *McKesson* Court also relied on Justice Harlan's statement that "a writ of error to review the final judgment of a state court, even when a state is a formal party and is successful in the inferior court, is not a suit within the meaning of the [Eleventh] Amendment." *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908) (Harlan, J.,

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[14] In *Hans v. Louisiana*, this Court continued to adhere to Chief Justice Marshall's understanding that the Eleventh Amendment is not implicated where " 'nothing is demanded from the state.' " 134 U.S. at 19 (quoting *Cohens*, 6 Wheat. (19 U.S.) at 410). The Court noted that "writs of error to judgments in favor of the crown, or of the state, had been known to the law from time immemorial, and had never been considered as exceptions to the rule that an action does not lie against the sovereign." *Id.* at 20.

concurring). Justice Harlan's *dictum*[15] relied exclusively on *Cohens*, which undermines rather than supports the proposition.[16]

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[15] Justice Harlan's comments in his concurrence in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), are plainly *dicta*. As Justice Harlan believed that the case had been decided below on an independent state law ground, he concluded that "what is said in the opinion of the court about the Eleventh Amendment is, I submit, entirely irrelevant to any decision of the present case by this court." *Id.* at 233 (Harlan, J., concurring). Nevertheless, he went on to add the statement quoted in the text. The Court's similar statements in *Chandler v. Dix*, 194 U.S. 590, 592 (1904), are likewise *dicta*. In that case, the Court considered whether suit could be filed in federal district court against a state to have a state tax declared unconstitutional. The Court held that "as this suit cannot be maintained against a state, the bill, so far as it seeks to have tax sales declared void, must be dismissed. . . . " 194 U.S. at 591. Thus, the issue of whether the Eleventh Amendment applied to the review of a state court judgment was not before the Court in *Dix*.

[16] Similarly, Justice Story relied exclusively on *Cohens* for his statement in his dissenting opinion in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. (36 U.S.) 420, 585 (1837), that the Supreme Court may review any state court decision rejecting a constitutional claim "whoever may be the parties to the original suit, whether private persons, or the state itself." Justice Story's sweeping statement was *dicta*, for in the very next sentence he stated that the Eleventh Amendment was not applicable because "the state of Massachusetts is not a party on the record in this suit, and therefore, the constitutional prohibition of commencing any suit against the state, does not apply. . . . " It is noteworthy that Justice Story's A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES reflects that he well understood the distinction drawn by Chief Justice Marshall in *Cohens* between a suit commenced *by* the state and one commenced *against* the state. Specifically, Justice Story stated that the Eleventh Amendment "was designed to prevent any suit being originally commenced *by* any private person *against* a State," while at the same time he recognized that a suit

Aside from the inapt invocation of *Cohens* and the *dicta* in Justice Harlan's concurring statement in *Crain*, the sole rationale advanced by the *McKesson* Court in support of its exercise of appellate jurisdiction over a suit brought against a state was the need for "national uniformity of federal law" that arises under the Supremacy Clause. 496 U.S. at 29.[17] The Court relied upon *Smith v. Reeves*, 178 U.S. 436 (1900), which in *dicta* stated that a state may

> consent to be sued in its own courts . . . and at the same time exclude the jurisdiction of the Federal courts – subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the state in any action brought against it with its consent may be reviewed or

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"originally commenced *by* a State *against* a private person in any other Court, which involved any [federal] question . . . might still be revised by the Supreme Court. . . . " Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 363, at 217 (The Legal Classics Library special ed., 1992) (emphasis in original).

[17] The Court referred to its "time-honored practice," 496 U.S. at 428, of asserting jurisdiction over states, but none of the cases cited in support of this practice even addressed the Eleventh Amendment. *See McKesson*, 496 U.S. at 27 n.8 (collecting cases). Accordingly, they have no bearing on the Eleventh Amendment issue raised here. Likewise, an Eleventh Amendment defense was not raised by the Director of State Police in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). *See also Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) (Eleventh Amendment not raised as jurisdictional defense in suit against state officer for injunctive (and monetary) relief). As the Court noted last Term, such "drive-by jurisdictional rulings . . . have no precedential effect," *Steel Co.*, 118 S. Ct. at 1011 (citations omitted), particularly in view of the fact that states may waive Eleventh Amendment immunity.

> re-examined [by the Supreme Court], *as prescribed by the act of Congress*, if it denies to the plaintiff any [federal] right. . . .

178 U.S. at 445 (emphasis added).[18]

Thus, an "act of Congress," presumably Section 25 of the Judiciary Act of 1789, was cited by the *Smith* Court as abrogating the states' sovereign immunity in such instances. This theory of abrogation, however, cannot survive the central holding of *Seminole Tribe* that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 73. Just as Congress lacks authority under the Commerce Clauses to abrogate the states' sovereign immunity under the Eleventh Amendment, so too Congress lacks such authority under Article III. As the Court in *Seminole Tribe* explained, the scope of the Eleventh Amendment cannot be limited " 'through appeal to antecedent provisions of the Constitution.' " 116 S. Ct. at 1128 (quoting *Pennsylvania v. Union Gas*, 491 U.S. 1, 42 (1989) (Scalia, J., dissenting)).[19]

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[18] This statement, too, was *dicta*; the Court held that the Eleventh Amendment precluded it from exercising jurisdiction over the case because the suit "though in form against an officer of the state" was in reality "against the state itself." 178 U.S. at 440.

[19] The Court's decision in *Smith* does not, contrary to the suggestion in *McKesson*, 496 U.S. at 30-31, stand for the proposition that states impliedly "assent" to the exercise of this Court's appellate "Judicial power" when they permit themselves to be sued in their own courts. Were this theory correct, then states would presumably be deemed to waive their sovereign immunity with respect to the exercise of federal judicial authority in all federal courts, "for the Amendment's unconditional language . . . makes no distinction between trial and appellate jurisdiction." *Seminole Tribe*, 517 U.S. at 113 (Souter, J., dissenting). Such a result is inconsistent with this Court's repeated insistence that any waiver of sovereign immunity be "unequivocally expressed," which serves the important purpose of foreclosing such a circumvention of the Eleventh Amendment. *Pennhurst State School*, 465 U.S. at 99. Finally, even if there were merit in this implied consent theory, Article I, Section 14 of the Alabama State Constitution makes clear that no consent, implied or otherwise, has been given by the State to the exercise of jurisdiction by this Court or any other court.

Even on its own terms, the "national uniformity" rationale is wholly inapplicable to this case, for it is premised on the assumption that the State has consented to be sued in its own courts. As demonstrated at length in our initial argument, however, the State of Alabama has unequivocally provided that it "shall never be made a defendant in any court of law." Ala. Const. art. I, § 14. Thus, suits complaining of unconstitutional state action, whether brought in federal court or Alabama's own courts, are confined to actions against state officers.

This fact raises a larger point. Nothing in the constitutional plan, including its requirement of federal supremacy, mandates the exercise of judicial power, whether state or federal, directly over a state:

> Undoubtedly the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws. But since the Constitution does not deem this to require that private individuals be able to bring claims against the *Federal Government* for violation of the Constitution or laws, it is difficult to see why it must be interpreted to require that private individuals be able to bring such claims against the *States*. If private initiation of suit against the offending sovereign as such is essential to preservation of the structure, it is difficult to see why it would not be essential at both levels. Indeed, if anything it would seem more important at the

> federal level, since suits against the States for violation of the Constitution or laws can at least be brought by the Federal Government itself. In providing federal immunity from private suits, therefore, the Constitution strongly suggests that state immunity exists as well. . . . I think it impossible to find in the scheme of the Constitution a necessity that private remedies be expanded beyond this, to include a remedy not available, for a similar infraction, against the United States itself.

Pennsylvania v. Union Gas, 491 U.S. 33-34 (1989) (Scalia, J., dissenting) (emphasis in original).

Faithful adherence to the principle of sovereign immunity embodied in the Eleventh Amendment will not undermine the federal courts' ability to prevent ongoing constitutional violations. As the Court in *Seminole Tribe* noted, there are several established means of vindicating constitutional rights in federal court. First, the United States may bring suit in federal court against a state. *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892)). Second, an aggrieved party may obtain prospective injunctive relief against a state officer in federal court. *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)). Third, a state may consent to federal court jurisdiction either by commencing a suit itself, as in *Cohens*, or by "unequivocally" waiving its sovereign immunity. *Pennhurst State School*, 465 U.S. at 99. As noted, here such consent has not been and could not under state law be given by the State of Alabama. *See Pugh*, 438 U.S. at 782 ("the State of Alabama shall *never* be made a defendant in *any* court of law or equity") (quoting Article I, Section 14 of the Alabama Constitution) (emphasis added). Quite apart from these avenues of relief, Congress is free to abrogate the states' Eleventh Amendment

rights when legislating pursuant to Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The history of the Eleventh Amendments' proposal and ratification brings the error of *McKesson* into sharp focus. The specific purpose of the Eleventh Amendment was to overrule *Chisholm v. Georgia*, which held that this Court had jurisdiction under Article III over an original action brought against Georgia by a citizen of another state. The states' objection to *Chisholm* was not that this Court had exercised its *original* jurisdiction over the suit, but that the Court had exercised jurisdiction at all. Had the Eleventh Amendment, when proposed to the states, contained an exception for the Supreme Court's appellate jurisdiction over suits brought against states in state courts, "[t]he supposition that it would [have been adopted] is almost an absurdity on its face." *Hans v. Louisiana*, 134 U.S. at 15.[20] This Court's decision in *McKesson* effectively reduces the Eleventh Amendment to little more than a requirement that litigants against the states exhaust their state court remedies.

Accordingly, in conformity with the text and history of the Eleventh Amendment, this Court should overrule *McKesson* and dismiss this case for want of jurisdiction.[21]

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[20] Indeed, some scholars have pointed to the Court's decision in *McKesson* as an across the board distinction between the two. *See, e.g.*, James Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. Rev. 161 (1998). If this understanding, which is concededly irreconcilable with the text of the Amendment, were correct, then there would be no obstacle to implementing the suggestion advanced by these scholars that Congress vest the federal courts of appeal with jurisdiction over unconsenting states. *Id.* at 197.

[21] As a technical matter, it may not be necessary to overrule *McKesson*, for that case did not fall within the plain

III. THIS COURT'S NEGATIVE COMMERCE CLAUSE JURISPRUDENCE SHOULD BE ABANDONED.

With James Madison, this Court has always recognized the two signal achievements of the system designed by the Framers of our Constitution:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)). This Court's negative Commerce Clause jurisprudence pierces both of these shields, the separation of powers and federalism, for its effect has been to grant the federal judiciary the legislative power, rightfully belonging to the state legislatures, to regulate commerce where Congress has not acted. As we shall demonstrate, it is an accepted feature of this jurisprudence that the rules promulgated by this Court are *not* divined from the Commerce Clause itself (for if they were, Congress would lack the power to amend them) but rather from the silence of Congress.[22] The theoretical

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language of the Eleventh Amendment; two of the petitioners in that case, Florida Beverage Corporation and Tampa Crown Distributors, Inc., were incorporated in the State of Florida and thus were not "Citizens of another State."

[22] Thus, it is important to recognize that the suggestion the Court is legislating in this field is very different from the (often unfair) criticism leveled against the Court's constitutional

justification for the Court's regulations – that by failing to act Congress expresses its will that certain state laws be preempted – cannot be squared with Article I, Section 7. And the reality of the Court's practice – that the Court is itself exercising the power to regulate commerce whenever Congress chooses not to act – is inconsistent both with the separation of powers (in that the Court is legislating) and with federalism (in that the Court is invalidating state laws that are contrary to neither the Constitution itself nor any law of the United States).

We respectfully submit that the Constitution's grant to Congress of the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, has no application where Congress has not exercised this power, and this Court should acknowledge that its decisions discerning substantive commercial regulations from the silence of Congress have been in error.

A. The Text and Structure of Article I Demonstrate that Congress' Power to Regulate Commerce Does Not Itself Operate as a Limitation Upon the States.

1. It has been settled at least since Chief Justice Marshall's unanimous opinion for the Court in *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122, 193 (1819), that "the mere grant of a power to congress, did not imply a prohibition on the states to exercise the same power."

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rulings in other areas. Whatever one thinks of the Court's interpretation of "due process," or "equal protection," in those areas the Court is attempting to ascertain the meaning of undeniably open-ended constitutional text. Here, it is a central feature of the Court's jurisprudence that the rules it promulgates are *not* required by the Court's interpretation of the text of the Constitution, and thus may be amended by Congress.

As this Court has long recognized, the three part textual analysis, later adopted in *Sturges*, for determining whether a particular power granted to Congress may be exercised by the states, originated with Alexander Hamilton:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (*quoted in Goldstein v. California*, 412 U.S. 546, 552-53 (1973) (applying test to determine whether states may exercise copyright power)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (observing that *Sturges* "endorsed Hamilton's reasoning in THE FEDERALIST NO. 32").

2. The application of this textual analysis to the power to regulate interstate commerce unquestionably leads to the conclusion that the power is not exclusively granted to Congress, but rather may be exercised concurrently by the states. *First*, the grant of power to regulate

commerce among the several states is not expressly made exclusive. *Second*, there is no express prohibition against its exercise by the states – except insofar as the Import-Export Clause or the Duty of Tonnage Clause apply. U.S. Const. art. I, cls. 2, 3. Indeed, the fact that the Framers believed it necessary to prohibit the states, "without the Consent of Congress, [from] lay[ing] any Imposts or Duties on Imports or Exports," and from "lay[ing] any Duty of Tonnage," strongly indicates that they did not believe the grant to Congress of the power to regulate commerce operated, in and of itself, as a limitation on the states. U.S. Const. art. I, § 10, cls. 2, 3. *See* THE FEDERALIST No. 32, at 199-200 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (prohibition against laying of import and export duties by the states leads to the conclusion that "the States, in all cases to which the restriction did not apply, would have the concurrent power of taxation with the Union"); *id.* at 201 ("We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States to insert negative clauses prohibiting the exercise of them by the States. . . . This circumstance is a clear indication of the sense of the convention. . . .).[23]

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[23] This is so regardless of whether one accepts the holding of *Woodruff v. Parham*, 8 Wall. (75 U.S.) 123 (1869), limiting the application of the Import-Export Clause to trade with foreign nations. *But see Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1620-28 (Thomas, J., dissenting) (arguing that the Import-Export Clause extends to trade among the States as well). The implication against exclusive federal power arising from the Import-Export Clause necessarily extends to both the power to regulate foreign commerce and the power to regulate interstate commerce because it is not plausible to ascribe to the Framers the notion that the power to regulate foreign commerce is by nature susceptible to concurrent exercise by the States while regulation of interstate commerce requires the uniformity borne of exclusivity.

Third, the nature of the power admits of concurrent exercise because "a similar authority in the States would [not] be absolutely and totally *contradictory* and *repugnant*." *Id.* at 198. Moreover, the line between interstate commerce (particularly in light of the virtually unlimited scope accorded to this field by the Court's modern Commerce Clause cases) and almost every area of legitimate state regulation (*e.g.*, regulation of intrastate commerce, taxation, health and safety regulations) plainly is not susceptible to clear demarcation. *See Sturges*, 4 Wheat. (17 U.S.) at 195-96. Accordingly, the power granted to Congress to regulate interstate commerce is not by nature exclusive, and the states should be permitted to exercise power over such cases within the "subject" (here, "commerce") "as the laws of the Union may not reach." *Id.* at 195.

This Court has always accepted the first part of this conclusion.

> Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (27 U.S.) 245 (1829), and *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299 (1852), it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.

Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 766-67 (1945).[24] Under the textual analysis embraced by

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[24] Prior to *Willson*, Justice Johnson had asserted that "[t]he power of a sovereign state over commerce . . . must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 227 (1824) (Johnson, J., concurring). Justice Johnson acknowledged that his "views of the subject [were] materially different from

Hamilton and adopted by the Court in *Sturges*, that should have been the end of the matter: where the power was not exclusively granted to Congress (whether by the terms of the grant, by separate prohibition against state exercise elsewhere, or by the nature of the power), "[i]t is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." *Sturges*, 4 Wheat. (17 U.S.) at 196; *see also Thornton*, 514 U.S. at 801 (" 'the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States' ") (quoting THE FEDERALIST No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Indeed, by the middle of the Nineteenth Century, Chief Justice Taney thought this conclusion inescapable. On the basis of a comprehensive analysis of the text of Article I and this Court's prior cases, the Chief Justice concluded that "the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce . . . ; and such regulations are valid unless they come into conflict

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those of my brethren," *id.* at 222-23 (Johnson, J., concurring). And notwithstanding some stray *dicta*, Chief Justice Marshall's opinion for the Court in *Gibbons* did not reach the question, having concluded that the State law at issue in the case had been preempted by an Act of Congress. *Id.* at 200 ("We may dismiss that inquiry, because [the power to regulate commerce] has been exercised, and the regulations which Congress deemed it proper to make are in full operation."). In any event, as noted in the text, five years later the Court, also in an opinion by Chief Justice Marshall, unanimously upheld a Delaware statute authorizing placement of a dam over a navigable creek – and thus within the ambit of Congress' power to regulate interstate commerce – because Congress had not exercised its power. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (27 U.S.) 245, 252 (1829).

with a law of Congress." *The License Cases*, 5 How. (46 U.S.) 504, 579 (1847) (Taney, C.J.), *overruled in part sub nom. Leisy v. Hardin*, 135 U.S. 100 (1890); *see also The Passenger Cases*, 7 How. (48 U.S.) 283, 470 (1849) (Taney, C.J., dissenting) (asserting that five Justices shared the above-quoted conclusion in *The License Cases*). Chief Justice Taney's analysis was rejected by the Court in *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299 (1852); the reasoning in that case (though not its holding) set the Court on the uneven course it has followed to this day of attempting to devise a principled basis for upholding some state regulations affecting interstate commerce while invalidating others.

3. In *Cooley*, the Court considered the validity of a Pennsylvania statute regulating pilots assisting ships bound for Delaware River ports. The Court had no doubt that these regulations "do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution." 12 How. at 316. Indeed, the Court pointed out that the First Congress, pursuant to its Commerce Clause power, had authorized the states to enact statutes regulating pilots like the Pennsylvania law at issue in the case. *Id.* at 317-18. Moreover, following Hamilton's analysis in THE FEDERALIST NO. 32 and the Court's decisions in *Sturges*, *Houston v. Moore*, 5 Wheat. (17 U.S.) 122 (1819), and *Willson*, the *Cooley* Court acknowledged that because "[t]he grant of the commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter[, i]f they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states." *Id.* at 318.

But for the first time, the Court adopted the view that "the nature of the power" could not be determined categorically, but instead varied from case to case:

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
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> Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id. at 319.

What is significant about *Cooley* is not the particular line chosen – between regulations affecting subjects that are national in nature and those that are local in nature – but rather the assertion that a line could be drawn at all by the Court. As a textual matter, there is simply no basis for the suggestion that the unitary grant of authority to Congress to regulate interstate commerce sometimes does exclude action by the states, but sometimes does not. Most fundamentally, the *Cooley* Court failed to recognize that the essentially *legislative* act of deciding whether a particular subject ought to be governed by a national rule or by a local rule is itself the regulation of commerce.[25]

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[25] Ironically enough, the Court's holding in *Cooley* did appear to reflect this truth. In deciding that the Pennsylvania pilotage law was local in nature, and thus not barred by the Commerce Clause, the Court relied on Congress' "authoritative

Nevertheless, in *Case of State Freight Tax*, 15 Wall. (82 U.S.) 232 (1873), the Court for the first time invalidated a state law on the basis of the Commerce Clause even though the state law conflicted with no Act of Congress. The Court, however, was soon forced to admit that the theory set forth in *Cooley* – that the Commerce Clause itself barred some (though not all) state legislation in areas within the scope of Congress' power to regulate interstate commerce – was erroneous.

4. At the outset of its analysis, in the course of considering the impact of the 1789 statute authorizing the states to regulate pilots, the *Cooley* Court squarely acknowledged the implications of the notion that the Commerce Clause by its own terms bars at least some exercises of state power:

> If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner reconvey to the states that power.

12 How. (53 U.S.) at 318. However, when the Court actually faced Commerce Clause claims against state legislation specifically authorized by Congress but contrary to the Court's prior holding that the Commerce Clause prohibited such state legislation, the Court abandoned its own regulation of commerce (and with it the *Cooley* theory) rather than refusing to accept Congress' regulation.

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declaration . . . [that] the nature of this subject is . . . local and not national." 12 How. (53 U.S.) at 319. Nevertheless, the Court's opinion makes clear that where *the Court*, not Congress, determines that a particular subject is national in character, the States may not act even in the absence of congressional exercise of the power.

At the end of the last century, a number of states enacted prohibition legislation forbidding the transportation of liquor. In *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465 (1888), and *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court struck down these laws under the *Cooley* theory, holding that "inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in character, [it] must be governed by a uniform system. . . . " *Leisy*, 135 U.S. at 109; *see also Bowman*, 125 U.S. at 480-81 (same). Congress, however, subsequently enacted legislation providing that liquor shipped in interstate commerce "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory. . . . " Act of Aug. 8, 1890, ch. 728, 26 Stat. 313.

In turning back a challenge to the application of this federal statute to save a Kansas prohibition law, the Court acknowledged that Congress may neither "transfer legislative powers to a state, nor sanction a state law in violation of the constitution." *In re Rahrer*, 140 U.S. 545, 560 (1891). Nevertheless, the Court recognized that Congress' decision "that the common interests did not require entire freedom in the traffic in ardent spirits" was not an attempt to delegate power to the states or to grant to them a power they did not possess. *Id.* at 561. Rather, Congress had "made its own regulation" of commerce, and the Court was bound to respect Congress' regulation because "[t]he framers of the constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *Id.* at 561, 562.

But the Iowa statute struck down in *Leisy* was indistinguishable from the Kansas law upheld in *Rahrer*. The Court resolved this tension by recharacterizing the basis for its negative Commerce Clause decisions. They rest, according to the *Rahrer* Court, on the proposition that "the inaction of congress was in itself equivalent to the

affirmative interposition of a bar to the operation of an undisputed power possessed by the states. We recall no decision giving color to the idea that, when congress acted, its action would be less potent than when it kept silent." *Id.* at 562; *see also id.* at 555 ("The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.").

In other words, this Court's decisions invalidating state laws under the negative Commerce Clause do not, as the *Cooley* Court thought, reflect the judgment that such laws are inconsistent with the Commerce Clause itself; rather they reflect the judgment that Congress silently preempted such laws by *failing* to exercise its power to regulate commerce. Over the past century, the Court has consistently adhered to this view "whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause. . . . " *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 425 (1946); *see also id.* at 422-27; *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 326-31 (1917).[26]

5. The decision in *Prudential*, upholding a tax that is materially indistinguishable from the Alabama tax at

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[26] Indeed, the Court has often taken comfort in this rule in light of the substantial limitations on its ability to make economic policy. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) ("This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one Congress has the ultimate power to resolve.").

issue in this case, establishes beyond all question that the Commerce Clause itself does not give rise to the limitations imposed by the Court's negative Commerce Clause cases. South Carolina imposed a tax on the privilege of conducting the business of insurance in the state solely on insurance companies incorporated in other states; South Carolina insurance companies were not taxed. *Prudential*, 328 U.S. at 410-11. In light of the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, the Court upheld the tax notwithstanding the Court's then-recent decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). As the Court explained, the argument that "the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. *No conceivable violation of the commerce clause, in letter or spirit, is presented*. Nor is contravention of any other limitation." *Prudential*, 328 U.S. at 436 (emphasis added). Alabama's franchise tax likewise presents "no conceivable violation of the commerce clause" itself.

6. The principle laid down in *Rahrer, James Clark Distilling Co.*, and *Prudential* has profound implications concerning the legitimacy of the Court's negative Commerce Clause jurisprudence. It necessarily rests on the notion that the rules promulgated in the Court's cases are themselves regulations of commerce among the states. It is for this reason that the Court has readily acceded to congressional decisions to overrule them – Congress, not the judiciary, was given the power to regulate commerce. As the Court explicitly acknowledged in *Prudential*, accepting congressional supremacy in this area necessarily entails rejection of the *Cooley* belief that the Court's decisions in this area arise from its interpretation of the Commerce Clause, for Congress unquestionably lacks the authority to enact statutes that are contrary to the terms of the Constitution as it has been interpreted by this Court. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 176-77

(1803); *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164, 2168 (1997); *Seminole Tribe v. Florida*, 517 U.S. at 93 (Stevens, J., dissenting) (" 'A statute cannot amend the Constitution.' ") (citation omitted).[27] This reality lays bare the error in the Court's assumption of the authority to invalidate state laws in the absence of congressional action.

The theory that Congress has through its silence exercised the power granted to it to regulate interstate commerce runs headlong into the requirements of Article I, Section 7 of the Constitution. The Court has repeatedly emphasized that the Constitution permits Congress to exercise the powers granted to it in Article I, Section 8 only "in accord with a single, finely wrought and exhaustively considered procedure" entailing bicameral passage and presentment to the President. *INS v. Chadha*, 462 U.S. at 951; *see also Clinton*, 118 S. Ct. at 2103-04; *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("unenacted approvals, beliefs, and desires are not laws"); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence."). The rules this Court has gleaned from the silence of Congress simply cannot be accorded the legal effect of Acts of Congress because they were neither

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[27] To be sure, the Court's opinions still often speak of its authority in this area as arising from the Commerce Clause itself. *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). But the Court's adherence to the understanding that Congress may reject judicial regulations in this area together with the unquestioned doctrine that the Court, not Congress, is the authoritative interpreter of the Constitution necessarily repudiates these statements, as the Court has recognized whenever squarely faced with legislation in which Congress has overridden one of the Court's negative Commerce Clause regulations.

passed by both Houses nor presented for approval to the President.[28]

It is true that the injury to separation of powers is somewhat mitigated by the fact that the Court defers to the legitimate holder of the power to regulate interstate commerce whenever Congress affirmatively expresses its disagreement with the Court's regulations. But just as it was "no answer" last Term "to say that Congress surrendered its authority by its own hand; nor [did] it suffice to point out that a new statute . . . could restore Congress to the power" it had attempted to relinquish in the Line Item Veto Act, *Clinton*, 118 S. Ct. at 2109 (Kennedy, J., concurring), Congress' ability to repeal this Court's regulations of commerce does not eliminate the harm to the Framers' design. *Cf. New York v. United States*, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

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[28] Moreover, whatever refuge the congressional silence theory affords cannot hide the reality that the Court's efforts in this field can only be understood as regulations of commerce – that is, legislation – promulgated by the Court itself. Like a legislature, the Court often must undertake extensive economic analysis in an attempt to develop beneficial regulations – analysis the Court has acknowledged Congress is better equipped to conduct. *E.g., Quill*, 504 U.S. at 318 ("the underlying issue is . . . one that Congress may be better qualified to resolve"). Moreover, the Court has been forced to develop principles governing when amendments to previously stated regulations shall be applied retroactively. *See American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) ("The very framing of the issue that we purport to decide today – whether our decision in *Scheiner* shall 'apply' retroactively – presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is.") (emphasis in original).

7. Even more troubling than the impact on the constitutional division of powers among the branches of the national government, the Court's negative Commerce Clause jurisprudence simply does not comport with the central axiom underlying our federal system: " '[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause.' " *Gregory*, 501 U.S. at 457 (citation omitted). The Supremacy Clause subordinates laws enacted by the states only to the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties. . . . " U.S. Const. art. VI. The Court's negative Commerce Clause regulations cannot be understood to flow from any of these sources – they are not mandated by the Commerce Clause itself, for Congress is free to amend them, and Congress has not enacted them into the laws of the United States.

The Court's decision in *Gregory* is instructive on this point. The Court emphasized the "decided advantage" held by the National Government in the "delicate balance" between federal and state power by virtue of the Supremacy Clause, pointing out that it enables Congress to "impose its will on the states. Congress may legislate in areas traditionally regulated by the states. This is an extraordinary power in a federalist system. It is a power that we must assume that Congress does not exercise lightly." 501 U.S. at 460. The negative Commerce Clause simply does not comport with this conception of our constitutional order, for its defining feature is the proposition that Congress has signaled its desire to exercise this "extraordinary power" by *not* acting. *See Rahrer*, 140 U.S. at 555 ("[T]he failure of congress to exercise this exclusive power [to regulate interstate commerce] in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.").

" '[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it.' " *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). But there is no "definite authority" behind the rules set forth in this Court's negative Commerce Clause jurisprudence – the Commerce Clause itself does not mandate these rules because Congress is free to change them and Congress has not promulgated them. Where a power granted to Congress is not exclusive, and Congress has not itself exercised the power granted to it, the Tenth Amendment precludes the Court from interfering with the states' actions. Put another way, the power to regulate commerce in the absence of congressional action was "not delegated to the United States by the Constitution," and certainly not to this Court, "nor prohibited by it to the States. . . . " U.S. Const. amend. X. Accordingly, this power is "reserved to the States respectively, or to the people." *Id.*

B. Considerations of *Stare Decisis* Do Not Preclude Abandonment of this Court's Negative Commerce Clause Jurisprudence.

1. This Court has repeatedly recognized that " '*[s]tare decisis* is not an inexorable command,' but instead reflects a policy judgment." *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). In this case, Alabama asks the Court to correct an error that has distorted the basic structures of our constitutional system. As Justice Scalia has put it, "the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent non-textual theory, that it was almost certainly not intended to undertake, . . . [but rather] acquired by a sort of intellectual adverse possession." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*,

483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

In this circumstance, the "policy judgment that 'in most matters it is more important that the applicable rule of law be settled than it be settled right,' " *Agostini*, 117 S. Ct. at 2016 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)), does not apply. Justice Brandeis, quoting Justice Holmes, has also stated the correct rule that applies where "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states": it is " 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' " *Erie*, 304 U.S. at 80, 79 (citations omitted). Indeed, the Court's negative Commerce Clause jurisprudence is precisely analogous to the situation presented in *Erie*.

Like the negative Commerce Clause, the doctrine of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), permitted the federal judiciary to declare law, binding on the states, grounded in neither the Constitution nor in any Act of Congress. "Since the Constitution grants sole and exclusive power to Congress to regulate commerce among the states, repeated assumption of this power by the courts – even over a long period of years – could not make this assumption of power constitutional. April 25, 1938, this Court overruled and renounced an unconstitutional assumption of power by the Federal courts based on a doctrine extending back through an unbroken line of authority to 1842." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 454 (1939) (Black, J., dissenting) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

Moreover, as in *Erie*, "[d]oubt . . . as to the soundness" of negative Commerce Clause doctrine has been repeatedly expressed. *Erie*, 304 U.S. at 72. Two Terms ago, three Justices of this Court set forth a comprehensive

analysis demonstrating "the need to abandon that failed jurisprudence. . . . " *Camps Newfound/Owatonna*, 117 S. Ct. at 1615-20 (Thomas, J., dissenting); *see also id.* at 1616 n.4 (citing scholarly criticism).[29]

Further, again like *Erie*, "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; . . . and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties." *Erie*, 304 U.S. at 74. Likewise, as Justice Thomas has pointed out, "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. In one fashion or another, every Member of the current Court and a goodly number of our predecessors have at least recognized these problems, if not been troubled by them." *Camps Newfound/Owatonna*, 117 S. Ct. at 1615-16 (Thomas, J., dissenting).

2. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). By its very nature, the Court's negative Commerce Clause jurisprudence is at war with these objectives. The judicial process does not lend itself to the formulation of sound economic regulations, and as a

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[29] The majority in *Camps Newfound/Owatonna* quite understandably did not directly address these arguments because no party in the case had asked the Court to repudiate its negative Commerce Clause precedents. *See, e.g., United States v. IBM*, 517 U.S. 843, 856 (1996) ("[W]e have rarely [overruled existing precedent] on grounds not advanced by the parties.").

result, the Court's efforts in this area have required constant revision. Justice Black, joined by Justices Frankfurter and Douglas, recognized this point nearly six decades ago:

> Judicial control of national commerce – unlike legislative regulations – must from inherent limitations of the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. . . . Unconfined by "the narrow scope of judicial proceedings" Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.

McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting). The inevitable result of these realities has been a jurisprudence constantly in flux – the very antithesis of "the evenhanded, predictable, and consistent development of legal principles," *Payne*, 501 U.S. at 827, *stare decisis* seeks to foster. *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. at 180 ("[T]he Court's understanding of the dormant Commerce Clause has taken some turns."); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (Court's negative Commerce Clause cases a "quagmire").

3. It has been suggested that retention of some portion of the Court's negative Commerce Clause jurisprudence may be necessary in order to "protect reliance interests. . . ." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in the judgment). However, examination of the interests served by dormant Commerce Clause doctrine reveals that they will be fully served by the mechanisms established by the Framers for their protection.

The Court has long justified its negative Commerce Clause cases by pointing to

> the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear . . . The provision thus 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Oklahoma Tax Comm'n, 514 U.S. at 179-80 (citations and quotations omitted).

There can be no question that this statement accurately captures the objective the Framers sought to achieve by including the Commerce Clause in the Constitution. It is equally clear, however, that abandonment of the negative Commerce Clause will not undermine this worthy goal because the text of the Constitution provides ample means for its attainment.

First and foremost, this Court's Twentieth Century jurisprudence has quite properly accorded Congress the

widest latitude in exercising its power to regulate interstate commerce. As Justice Kennedy has aptly observed, our current economic system depends upon the ability of Congress to "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring). Abandoning the negative Commerce Clause thus would in no way expose the Nation's economy to "Balkanization"; to the contrary, the means chosen by the Framers to avoid that result stand ready, if anything strengthened by the expansive understanding this Court has accorded the Commerce Power. Congress is fully empowered to take the steps necessary to block state laws that it concludes – that *it* concludes – are harmful to the economy.

Indeed, Congress could enact a negative Commerce Clause law, essentially prohibiting any state law having the effect of interfering with interstate commerce, or Congress could enact legislation adopting some but not all of the Court's negative Commerce Clause rules. Such legislation would grant the Court the authority it now lacks to police state laws thought to be inconsistent with good national economic policy.

To be sure, Congress may very well take a different view of particular state laws than that taken by this Court's negative Commerce Clause cases. For example, in *Prudential*, the Court described economic considerations supporting South Carolina's decision to tax only foreign companies for the privilege of conducting the business of insurance: "That judgment was one of policy and reflected long and clear experience. For, notwithstanding the long incidence of the tax and its payment by Prudential without question prior to the *South-Eastern* decision, the record of Prudential's continuous success in South Carolina over decades refutes any idea that payment of

the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies." 328 U.S. at 432. The similar record of petitioners in this case could very well convince Congress not to impede Alabama's franchise tax. The point is Congress possesses both the institutional resources to make such fine economic judgments and the power to override state actions that it determines are contrary to the national economic interest.

Moreover, as Justice Thomas explained two Terms ago, the primary evil the Court has sought to combat in its negative Commerce Clause cases, discriminatory state taxes on goods traveling across state lines, could very well be prohibited by the plain text of another provision of the Constitution, the Import-Export Clause. *Camps Newfound/Owatonna*, 117 S. Ct. at 1620-28 (Thomas, J., dissenting) (asserting that the Court erred in *Woodruff v. Parham*, 8 Wall. (75 U.S.) 123 (1869), in limiting Import-Export Clause to overseas trade).[30]

Finally, it is important to recognize that existing reliance interests will not be seriously disrupted by a decision to restore the structure established by our Constitution, a decision acknowledging the power of the states to regulate and tax as they see fit whenever their actions do not conflict with Congress' exercise of its power to regulate commerce. It is true that Congress has undoubtedly foresworn some preemptive regulation it otherwise would have enacted in light of the Court's activity in this field. But the states have likewise foresworn legislation contrary to this Court's cases – either

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[30] Application of the Import-Export Clause to trade among the States would not call into question Alabama's franchise tax because it plainly is not "a tax levied on *goods* at the time of *importation*." *Camps Newfound/Owatonna*, 117 S. Ct. at 1628 (Thomas, J., dissenting) (emphasis in original).

voluntarily or following litigation. A decision abandoning the negative Commerce Clause would put Congress on notice that activity by the states going forward will be upheld unless Congress exercises its Commerce Clause power to block it. In this way, the effect of such a decision would be to provide both Congress and the states with a clean slate, thereby enabling "a single courageous state [to], if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction or as improvidently granted. In the alternative, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

BILL PRYOR
Attorney General
RON BOWDEN
DAN E. SCHMAELING
Assistant Attorneys General
State of Alabama
P.O. Box 320001
Montgomery, AL 36132
(334) 242-7300

CHARLES J. COOPER*
MICHAEL W. KIRK
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

Counsel for Respondents

**Counsel of Record*

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IN THE
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SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONERS

WALTER HELLERSTEIN
UNIVERSITY OF GEORGIA
LAW SCHOOL
Herty Drive
Athens, Georgia 30602
(706) 542-5175

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

* Counsel of Record

(Additional counsel listed on inside cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

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REPLY BRIEF FOR PETITIONERS

Respondents have filed what surely must be one of the oddest briefs the Court will receive this Term. Having spent nearly a decade entangling petitioners in disputes over state-law res-judicata principles and insisting that Alabama's franchise tax scheme does not offend the Commerce Clause under this Court's precedents, respondents now expressly decline to defend the Alabama Supreme Court's decision on either of those grounds. *See* Br. 3. Instead, in an act of apparent desperation, respondents offer up lengthy arguments on three questions that they never raised below, that the Alabama Supreme Court did not address, and that this Court did not agree to review. Indeed, in violation of this Court's Rule 15.2, respondents failed to raise these questions even in their brief in opposition to certiorari, thereby depriving petitioners of an opportunity to address them in their opening brief. In light of respondents' defaults, this Court may—and should—decline to reach any of these issues.

In any event, each of respondents' new arguments founders on binding precedent. *First*, contrary to respondents' claim that the Alabama Supreme Court lacked jurisdiction over this case, that court itself has conclusively ruled—in decisions that respondents fail to mention—that the constitutional provision on which they predicate their argument has no application to judicial-review proceedings brought under the statutory provisions that petitioners invoked in this case.

Second, nothing in this Court's precedents—or even in the dissent in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), on which respondents rely—remotely supports their request that the Court overrule *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and hold that the Eleventh Amendment prohibits this Court from exercising appellate jurisdiction to review federal constitutional questions decided by a state court in the State's favor.

Third, while conceding that the decision below cannot be squared with this Court's Commerce Clause precedents, respondents invite the Court to repudiate its entire negative Commerce Clause jurisprudence. But this Court has consistently rejected similar suggestions in the past, and this case—involving a tax that is both blatantly discriminatory and indistinguishable from other taxes the Court has struck down repeatedly and recently—is an especially inappropriate vehicle for any such wholesale reconsideration of long-settled constitutional principles.

Despite respondents' unwillingness to defend the judgment below on either of the issues on which this Court granted certiorari, the Court *should* address them. Any disposition short of a decision on the merits would effectively reward a litigation strategy in which a respondent, in disregard of this Court's rules, opposes certiorari on the merits of the questions presented by the petition but then, *after* certiorari has been granted, abandons any defense on

the merits and manufactures new arguments never raised before in the hope of avoiding or delaying an adverse disposition on the questions the Court has agreed to review. *See Lawrence v. Chater*, 116 S. Ct. 604, 607, 610 (1996) (per curiam).

This Court should therefore decline to reach respondents' three eleventh-hour arguments, should instead decide the questions on which it granted certiorari, should reject the arguments that respondents made on those questions in the courts below and in their opposition to certiorari, and should remand for further proceedings, including the provision of meaningful backward-looking relief.

I. THE COURT SHOULD NOT REACH RESPONDENTS' STATE-LAW JURISDICTION ARGUMENT, WHICH IN ANY EVENT IGNORES CONTROLLING ALABAMA SUPREME COURT PRECEDENT.

Respondents argue that, under state law, the Alabama Supreme Court lacked jurisdiction over this case, and that this Court therefore also lacks jurisdiction. *See* Br. 7-14. Respondents predicate their argument on Section 14 of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. Art. I, § 14. Because of that clause, respondents say, the Alabama courts necessarily lacked jurisdiction over the State and the Department of Revenue—the only state parties, according to respondents, who were before the Alabama Supreme Court. *See* Br. 7-9. Although respondents acknowledge that they never raised this argument in the state courts or in their opposition to certiorari, they assert that this Court must nevertheless address it because it goes to jurisdiction. *See* Br. 12-13.

But there is no cause for this Court to grapple with this state-law issue. Even if the Court were prepared to overlook respondents' failure, in clear violation of Rule 15.2, to raise this issue in their brief in opposition, this Court does not address, in any but the most "exceptional cases,"

questions that a respondent raises here for the first time. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). That rule applies with "peculiar force" in "cases coming here from state courts." *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). There is of course nothing "exceptional" about the issue respondents raise, which is one purely of state law. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988) ("we are especially disinclined to become involved in resolving disputes about Texas law that should have been presented to the state courts").[1]

Respondents assert, however, that this Court is *required* to address an argument raised here for the first time if it goes to the jurisdiction of the court below—even if the case comes from a state court.[2] But respondents do not cite a single case in which this Court has ever second-guessed the jurisdiction of a state court where the state court itself had not found jurisdiction lacking.[3] More

[1] Indeed, because respondents seek to alter the judgment entered below (from an affirmance to a dismissal), it is not clear that they could have raised this point in any way other than by filing a cross-petition. *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 363-64 (7th ed. 1993).

[2] The premise of this argument—that under Alabama law sovereign immunity is "both jurisdictional and not waivable" (Resp. Br. 4)—is by no means as clear as respondents portray it. *See State Dep't of Revenue v. Price-Williams*, 594 So.2d 48, 51 (Ala. 1992) ("Sovereign immunity is an affirmative defense. It is waived if it is not affirmatively pleaded at the trial court level.") (citations omitted).

[3] Where a state court has dismissed an appeal on grounds of jurisdiction, that is of course an independent state-law ground. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 115 (7th ed. 1993). That is what had happened in each of the cases coming from a state court cited by respondents at page 10 of their Brief. *See Palmer v. Ohio*, 248 U.S. 32, 33 (1918) ("[t]he Supreme Court of the state affirmed the action of the lower courts in dismissing the petition on the ground that the state had not consented so to be sued"); *Callan v. Bransford*, 139 U.S. 197, 198 (1891) (cases "were dismissed by the [state] court of appeals upon the ground that . . . the amount in controversy in each case was less than sufficient to give the court jurisdiction"); *Smith v. Adsit*, 83 U.S. (16 Wall.) 185, 188 (1873) ("He then appealed to the Supreme Court of the State, where . . . the bill was dismissed as to him . . . for want of jurisdiction."); *Semple v. Hagar*, 71 U.S. (4 Wall.) 431, 434-35 (1867) ("State court . . . refused to take jurisdiction of the case."); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 530 (1858) ("the case was thereupon dismissed, for want of jurisdiction"); *President & Dirs. of the Bank of Washington v. Arkansas*, 61 U.S. (20 How.) 530, 532 (1858) ("it was dismissed by the State court for want of jurisdiction").

significantly, *Heath v. Alabama*, 474 U.S. 82 (1985), is directly to the contrary. There, too, an argument that Alabama courts lacked jurisdiction was made here for the first time, but this Court—at the urging of the State of Alabama, whose position in *Heath* was directly contrary to its position here[4]—declined to address it, proceeding directly to the merits. "Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court," the Court explained, "the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Id.* at 87. *Heath* thus establishes that questions going to the jurisdiction of a state court are waived unless they are raised there first.

The illogic of respondents' contrary position is made obvious by their concession that, "in cases coming from state supreme courts, this Court lacks the power to review and correct jurisdictional determinations actually made in the court below." Br. 10 n.4. Respondents do not explain why this Court *must* review an issue of state-law jurisdiction if the state court has not addressed it, whereas it *may not* review such an issue where the state court has addressed it.

[4] The State of Alabama, as the respondent in *Heath*, argued that, because "[n]o question of jurisdiction was decided in the court below[,] . . . [t]he question of jurisdiction is . . . not before this court." Brief for Respondent at 33, *Heath v. Alabama*, No. 84-5555 (filed June 11, 1985).

Nor do respondents explain why a state-court decision reaching the merits of a dispute should not be understood to embody an implicit determination that the court has jurisdiction—a determination of state law that, in respondents' words, "this Court lacks power to review." Br. 10 n.4.

If the Court does consider the merits of respondents' argument, it will find that their jurisdictional theory rests on a mistaken reading of Section 14.[5] The Alabama Supreme Court has held repeatedly that Section 14's proscription against making the State "a *defendant* in any court" is no obstacle to making the State an *appellee* on judicial review of agency action. As explained in *State v. Louis Pizitz Dry Goods Co.*, 11 So.2d 342 (Ala. 1943), the State in such a proceeding is "not thereby made a party defendant in violation of section 14 of the Constitution, but is the appellee on an appeal in which it already is a party." *Id.* at 346; *see State v. Norman Tobacco Co.*, 142 So.2d 873, 875 (Ala. 1962) ("not a suit against the State"); *Metcalf v. Department of Indus. Relations*, 16 So.2d 787, 790 (Ala. 1944) ("These proceedings are in effect only an appeal from the order of the Department of Industrial Relations .... This is not forbidden by § 14 of the Constitution.").[6]

The judicial-review procedures invoked by petitioners are squarely within that rule. Petitioners brought these consolidated cases in the Alabama Circuit Court, each time naming the "State of Alabama, Department of Revenue" as "respondent/appellee," seeking judicial review of two sets of decisions of the Alabama Department of Revenue.[7] *First*, petitioners sought review of five "final assessments,"[8] invoking Ala. Code § 40-2-22.[9] That section provides that "[e]ither the state or the taxpayer may appeal from any final assessment" and requires the State of Alabama (not a state officer) to be named as the appellee.[10] In two of the decisions discussed above, *Louis Pizitz* and *Norman Tobacco*, the Alabama Supreme Court re-

[5] The Court therefore need not decide whether the imposition of a Section 14 bar would violate federal law. *See Reich v. Collins*, 513 U.S. 106, 109-10 (1994).

[6] Respondents' failure to bring these decisions to the Court's attention is particularly striking in light of their sweeping pronouncements about Alabama law. *See* Br. 2 ("it is clear from ... the Alabama Supreme Court's uniform decisions ... that the Alabama Supreme Court itself lacked jurisdiction"); Br. 14 ("the Alabama Supreme Court's consistent decisions ... leave no room for doubt that the Alabama Supreme Court lacked jurisdiction"); Br. 14 n.7 ("there can be no question that the Alabama Supreme Court must dismiss this case for lack of jurisdiction at the first opportunity on remand").

[7] *See generally Melof v. Hunt*, 718 F. Supp. 877, 880-84 (M.D. Ala. 1989) (explaining different kinds of review proceedings available under Alabama law). In addition to the eight proceedings addressed in the text, the BellSouth petitioners also brought two proceedings (pursuant to Ala. Code § 40-1-11, repealed in 1992) against the State, the Department, and the Commissioner in connection with certain taxes paid under protest in 1990 and 1991. *See* No. CV-90-1591 (Rec. 30, 473, 1033, 1844); No. CV-91-1079 (Rec. 524, 1838). Because the Alabama courts' jurisdiction with respect to the eight proceedings discussed in the text is so plain, there is no need to address these two additional proceedings.

[8] *See* No. CV-89-2600 (BellSouth petitioners, tax year 1989) (Rec. 1, 4, 465, 1850); No. CV-90-1711 (BellSouth petitioners, tax year 1990) (Rec. 101, 117, 470, 1832); No. CV-90-2555 (CSX petitioners, tax year 1989) (Rec. 130, 152, 170, 367, 1024, 1818); No. CV-90-2556 (CSX petitioners, tax year 1990) (Rec. 145, 256, 275, 331, 1031, 1828); No. CV-91-2151 (CSX petitioners, tax year 1991) (Rec. 702, 707, 727, 738, 757, 766, 786, 815, 1026, 1808).

[9] Effective October 1, 1992, Section 40-2-22 was superseded by Section 40-2A-7(b)(5), as part of the enactment of the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act. Section 40-2A-7(b)(5) provides for substantially the same procedure as Section 40-2-22.

[10] *See, e.g., Birmingham Vending Co. v. State*, 38 So.2d 876, 879 (Ala. 1949) ("That statute shows clearly that the parties to it are the State and taxpayer."); *Rutledge Petroleum Corp. v. F&W Trucking*, 545 So.2d 60, 62 (Ala. Civ. App. 1988) ("The proper parties to an appeal pursuant to section 40-2-22 are the State of Alabama and the taxpayer.").

jected a Section 14 challenge to this very assessment-appeal procedure.[11]

Second, petitioners sought review of three orders denying their petitions for tax refunds.[12] For this purpose, petitioners invoked the default judicial-review provisions of the Alabama Administrative Procedure Act ("APA"), Ala. Code § 41-22-20, which similarly requires that "[t]he petition for review shall name the agency as respondent," *id.* § 41-22-20(h).[13] Although we have found no case expressly addressing the constitutionality of Section 41-22-20 (the Alabama APA), that provision contemplates the same kind of appeal procedure as that prescribed by Section 40-2-22. The cases discussed above (*Louis Pizitz*

[11] At the time *Louis Pizitz* and *Norman Tobacco* were decided, the procedure was set forth in Ala. Code of 1940, tit. 51, § 140. In all relevant respects, Section 140 was identical to Section 40-2-22.

[12] *See* No. CV-91-397 (South Central Bell, tax years 1986-88) (Rec. 429, 436, 459, 502, 1019, 1822); No. CV-90-2558 (CSX petitioners, tax years 1982-85) (Rec. 137, 177, 213, 397, 1021, 1813); No. CV-90-2557 (CSX petitioners, tax years 1986-88) (Rec. 141, 223, 249, 419, 1028).

[13] At the time these actions were filed, Alabama law did prescribe the procedure by which the Department of Revenue was to consider a refund petition, *see* Ala. Code § 40-1-34, but it did not specifically address the appropriate mechanism for seeking judicial review of the Department's disposition of such a petition. The Department's own regulations therefore instructed taxpayers to use the default procedure set forth in the Alabama APA to appeal a decision denying a refund request. *See* Ala. Tax Reg. 810-1-3-.13(1)(b) (repealed May 6, 1993) ("In all contested cases involving refunds, . . . the taxpayer may appeal from the final order of the Department as provided by Code of Ala. 1975, § 41-22-20."). Out of an abundance of caution, petitioners also invoked Section 40-2-22 (concerning final assessments), and filed petitions for mandamus against the Commissioner of Revenue (the judicial-review vehicle that had been used before the Alabama APA took effect in 1982). *See generally Sparks v. Louisville & N.R.R.*, 166 So.2d 865, 866 (Ala. 1964); *Haden v. Rhodes*, 123 So.2d 916, 918 (Ala. 1960). Effective 1992, Section 40-1-34 was superseded by Section 40-2A-7(c), which expressly makes available the same kind of judicial-review procedure as that applicable to final assessments. *See* Ala. Code § 40-2A-7(c)(5)(b).

and *Norman Tobacco*, further confirmed by *Metcalf*) should therefore equally immunize the APA from Section 14 attack.

On the strength of *Louis Pizitz*, *Norman Tobacco*, and *Metcalf*—none of which has ever been questioned—the Alabama courts have entertained countless tax appeals in cases like this, in which the State or the Department of Revenue was named as an appellee or respondent.[14] Respondents' attempt to wish away this long history of judicial review in Alabama is entirely meritless.[15]

[14] *See, e.g., Turner v. State Dep't of Revenue*, 643 So.2d 568 (Ala. 1994); *Champion Int'l Corp. v. State*, 405 So.2d 932 (Ala. 1980); *Butler & Kennamer Wholesale Co. v. State*, 301 So.2d 178 (Ala. 1974); *Morgan v. State*, 194 So.2d 820 (Ala.), *cert. denied*, 389 U.S. 7 (1967); *Hispan Corp. v. State Dep't of Revenue*, 709 So.2d 1233 (Ala. Civ. App. 1997), *cert. denied*, No. 1962057 (Ala. 1998); *Mead Coated Bd., Inc. v. Department of Revenue*, 701 So.2d 10 (Ala. Civ. App.), *cert. denied*, No. 1961213 (Ala. 1997); *LL&E Petroleum Mktg., Inc. v. State Dep't of Revenue*, 683 So.2d 978 (Ala. Civ. App. 1995), *rev'd on other grounds*, 683 So.2d 980 (Ala. 1996); *Marks-Fitzgerald Furniture Co. v. State Dep't of Revenue*, 678 So.2d 121 (Ala. Civ. App. 1995), *cert. denied*, No. 1950623 (Ala. 1996); *AT&T Communications of the South Central States, Inc. v. State Dep't of Revenue*, 677 So.2d 772 (Ala. Civ. App. 1995), *cert. denied*, No. 1950633 (Ala. 1996). Indeed, in at least one such case, this Court reviewed the Alabama Supreme Court's judgment on the merits. *See Dunbar-Stanley Studios, Inc. v. State*, 210 So.2d 696 (Ala. 1968), *aff'd*, 393 U.S. 537 (1969).

[15] Because it is clear that the State and the Department of Revenue are properly before it, this Court need not address whether the Commissioner is also a party before the Court. Contrary to respondents' assertion, however, it is quite plain that he is a party here. Respondents (Br. 2 n.1) rely on *Sperau v. Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), *vacated on other grounds*, 517 U.S. 1217 (1996), which purported to require that a notice of appeal specifically list each appellee. But *Sperau* has no application here: in *Sperau* itself and in each of the cases on which *Sperau* relied, the appellant had failed to signal any intent to appeal the judgment or order affecting a particular party. *See* 674 So.2d at 40. By contrast, petitioners' notice of appeal specifically listed the docket numbers of all consolidated cases decided by the trial court (in-

II. THE COURT SHOULD NOT REACH RESPONDENTS' ELEVENTH AMENDMENT ARGUMENT, WHICH IN ANY EVENT IS MERITLESS.

Respondents next argue that this is a "suit . . . against one of the United States" within the meaning of the Eleventh Amendment, and that this Court therefore may not hear it. *See* Br. 15-27. In particular, respondents claim that the Eleventh Amendment not only bars suits against States commenced in the lower federal courts, but also strips this Court of the ability to review state-court decisions in which a State has prevailed. *See* Br. 16-17. But there is no reason for the Court to reach that issue, and it should not do so: under Rule 15.2, respondents "waived this argument by failing to raise it in [their] brief in opposition to the petition for certiorari." *Knowles v. Iowa*, 119 S. Ct. 484, 487 n.2 (1998); *see Howlett v. Rose*, 496 U.S. 356, 381 n.24 (1990) (refusing, under Rule 15.2, to

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cluding the five in which the Commissioner was a party), the notice stated that petitioners were appealing from the "single judgment affecting all [consolidated] cases," and petitioners served the notice on counsel who had represented the Commissioner throughout the trial-court proceedings (the same counsel who represented the State and the Department). *See* Rec. 2271-74. The caption of the notice of appeal was simply copied from the trial court's decision, which omitted the Commissioner. *See* Rec. 2275. Moreover, there is no reason to believe that *Sperau*'s requirement cannot be waived; thus, by failing to raise the issue below, the Commissioner's attorneys waived any defect. *See State v. National Cash Credit Ass'n*, 141 So. 541, 543 (Ala. 1932). Finally, *Sperau* was decided after petitioners filed their notice of appeal and therefore cannot be allowed to bar review. *See Reich*, 513 U.S. at 113 ("[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court") (internal quotation marks omitted). In sum, the Commissioner plainly *was* a party in the Alabama Supreme Court and is therefore a party here as well. *See* Sup. Ct. R. 12.6. Although petitioners neglected to include the Commissioner among the parties named in the Rule 24.1(b) list in their opening brief (*see* Br. ii), the omission was inadvertent and should have no effect on this Court's jurisdiction. *Cf. Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 221 n.6 (1985).

reach argument that "school board is an arm of the State and thus is not a person under § 1983").

Respondents imply that the Eleventh Amendment issue is "jurisdictional" for purposes of Rule 15.2 and therefore cannot be waived, *see* Br. 15 n.9, but that is not so. Although the Court has stated that an Eleventh Amendment defense "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court," *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), the Court has "never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion," *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982); *see Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2052 (1998) ("Unless the State raises the matter, a court can ignore it."). Indeed, the Court in *Patsy* declined to address an Eleventh Amendment issue because the State had failed to reiterate the argument in its merits brief—even though the State *had* raised the point in its brief at the certiorari stage. *See Patsy*, 457 U.S. at 515 n.19; *id.* at 523 & n.6 (Powell, J., dissenting). If the Court may pretermit an Eleventh Amendment issue in the circumstances in *Patsy*, it certainly has that discretion here.[16]

In any event, respondents concede that their proposed rule runs headlong into *McKesson Corp. v. Division of*

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[16] Strict enforcement of Rule 15.2 is particularly appropriate in the Eleventh Amendment context, where members of this Court have expressed distinct reluctance to resolve important issues on less than full briefing. *See, e.g., Schacht*, 118 S. Ct. at 2057 (Kennedy, J., concurring) ("the proper course is for us to defer addressing the [Eleventh Amendment] question until it is presented for our consideration, supported by full briefing and argument, in some later case"); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in the judgment) (finding invitation to overrule Eleventh Amendment precedent to raise "complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters"); *Patsy*, 457 U.S. at 515 n.19 (declining to address Eleventh Amendment defense because "the parties have not briefed the issue").

Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), in which this Court squarely held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *Id.* at 31. There simply is no good cause to rethink *McKesson*. Unlike the "splintered decision" overruled in *Seminole Tribe*, 517 U.S. at 66 (internal quotation marks omitted), *McKesson* was decided by a unanimous vote, and it has not in any way proved "unworkable," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Contrary to respondents' suggestion (Br. 18), the *McKesson* Court did not misread *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). The Court expressly recognized that *Cohens* involved "a proceeding commenced in the first instance by the State itself against a citizen" and that "the [*Cohens*] Court's holding might be read as limited to that circumstance." 496 U.S. at 27. Despite that acknowledgment, the *McKesson* Court noted the settled understanding of individual Justices and its "consistent practice" of reviewing state-court decisions in which a State has prevailed, even where the State was a defendant. *Id.* The Court concluded that it was simply too late in the day to turn back on a practice that was both tested by time and central to "this Court's role in our federal system." *Id.* at 28. The argument to the contrary has become no stronger with the passage of eight years.

Justice Souter's dissent in *Seminole Tribe* cannot help respondents. Although he criticized the reasoning in *McKesson*, *see id.* at 113 n.10, Justice Souter did not quarrel with the result in that case. His position was that this Court fundamentally misread the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890), *see Seminole Tribe*, 517 U.S. at 117, and that, properly understood, the Eleventh Amendment affects only suits against States in which federal jurisdiction rests solely on diversity, *see id.* at 109-16—a view that, if adopted by the full Court, would leave respondents here without *any* Eleventh Amendment protection. Moreover, Justice Souter argued not for

overruling *Hans* (only against extending it), *see id.* at 130, 159, 183, and nothing in his opinion suggests that he would favor overruling *McKesson* either—particularly without first overruling *Hans*.

Even if the Court were otherwise open to reconsidering *McKesson*, this case would be an especially poor vehicle for doing so because, even if the Court were to overrule that decision, the result here would remain the same. The Court would still have to decide whether, for purposes of the Eleventh Amendment, the state-court appeal procedures invoked in this case amount to a "suit . . . commenced or prosecuted against one of the United States." This Court has long allowed the answer to such questions to be informed by relevant state law. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Thus, in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court determined that a particular state statute "clearly provide[d] for an action against the state" because "[n]o state court decision . . . indicate[d] that a different interpretation of this statute has been adopted by state courts." *Id.* at 463. Here, in contrast, the Alabama courts have unambiguously determined that the kind of state-court proceeding at issue simply "is not a suit against the State." *Norman Tobacco*, 142 So.2d at 875.

III. THE COURT SHOULD NOT REACH RESPONDENTS' COMMERCE CLAUSE ARGUMENT, WHICH IN ANY EVENT IS MERITLESS.

Respondents concede that there is no "flaw" in petitioners' claim that Alabama's franchise tax scheme is unconstitutional under "this Court's recent negative Commerce Clause cases." Br. 3. They seek to avoid the consequences of that concession, however, by asking the Court to overturn the settled doctrine that the Commerce Clause by its own force imposes certain restraints on state power. *See* Br. 28-50. The Court need not and should not address this argument either. Respondents waived the argument

by failing to raise it in their brief in opposition, *see* Sup. Ct. R. 15.2, and they failed to raise the point even in the Alabama courts, though they were plainly required to preserve it there, *see Illinois v. Gates*, 462 U.S. 213, 220-23 (1983).

In any event, respondents' argument is meritless. From time to time throughout its history, the Court has heard similar broadside attacks on the legitimacy of its Commerce Clause doctrine, but the Court has never seriously entertained any of them. Just two Terms ago, for example, the Court observed that it had long endorsed the view that "the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1596 (1997). "Our decisions on this point," the Court explained, "reflect '*upon fullest consideration*, the course of adjudication unbroken through the Nation's history.'" *Id.* (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)) (emphasis added).

Similarly, a half-century earlier, in response to dissents of Justices Black and Douglas, who questioned the foundations of the Court's dormant Commerce Clause jurisprudence, the Court stated: "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

And the case for the negative Commerce Clause does not rest solely on its longevity. In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), the Court, after noting that it had "consistently" construed the Commerce Clause as "prohibiting certain state taxation even

when Congress has failed to legislate on the subject," described the underlying justification for its negative Commerce Clause jurisprudence:

> We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.

Id. at 179-80.

Indeed, the Court has stated that "[t]he 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).[17] In implementing this "negative aspect" of the Commerce Clause, "[p]erhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

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[17] As the Court further explained: "In one of his letters, Madison wrote that the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.' 3 M. Farrand, Records of the Federal Convention of 1787, p. 478 (1911)." 512 U.S. at 193 n.9. Professor Regan has similarly observed that "[t]here is much evidence that the main point of this grant (unlike the grant of power over foreign commerce) was not to empower Congress, but rather to disable the states from regulating commerce among themselves." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1125 (1986) (citing Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 481-94 (1941)).

Even if the Court were prepared to rethink its settled precedent, the reliance interests of an entire economy structured around the negative Commerce Clause doctrine would weigh heavily against abandoning it. For example, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court refused to overrule *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), which had held that the Commerce Clause precludes a State from requiring a mail-order seller with no physical presence in the State to collect and pay a use tax on goods sold to purchasers within the State. Central to the *Quill* Court's reasoning was that "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework for a sizable industry," 504 U.S. at 317, and that "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* therefore counsels adherence to settled precedent," *id.* (citation omitted); *see also id.* at 320 (Scalia, J., concurring in part and concurring in the judgment). The dislocations that the *Quill* Court was unwilling to inflict on the mail-order industry would of course be nothing compared to the chaos that a wholesale abandonment of the negative Commerce Clause doctrine would visit upon the economy at large. Moreover, Congress always retains the "ultimate power" to overturn through legislation the effect of any of this Court's Commerce Clause rulings—a fact that has diminished the Court's inclination to reconsider its established precedents. *See Quill*, 504 U.S. at 318; *see also id.* at 320 (Scalia, J., concurring in part and concurring in the judgment).

Furthermore, even if the Court were inclined to reconsider the theoretical underpinnings of its negative Commerce Clause jurisprudence, this would be a wholly inappropriate case in which to do so. Quite apart from the fact that respondents' failure to raise the issue in a timely manner has deprived the Court of full briefing, the discriminatory nature of the franchise tax scheme at issue makes this case a particularly ill-suited vehicle for re-examining Commerce Clause precedents. Even members of this Court who have criticized the dormant Commerce Clause doctrine have recognized that facially discriminatory taxes are unconstitutional. *See Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994) (opinion of Thomas, J., reflecting views of eight Justices, with Justice Blackmun concurring in the judgment without opinion); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (opinion of Scalia, J., speaking for a unanimous Court); *see also Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (unanimous opinion). Justice Scalia, for example, has consistently stated that he will concur in decisions striking down taxes that reflect "rank" or "facial" discrimination.[18]

Justice Scalia has also indicated that, in Commerce Clause cases, "*stare decisis*—that is to say, a respect for the needs of stability in our legal system—would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law." *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment). Thus, Justice Scalia (joined by Justice Thomas) has explained:

> I will, on *stare decisis* grounds, enforce a self-executing "negative" Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.

West Lynn Creamery, 512 U.S. at 210 (Scalia, J., concurring in the judgment).[19]

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[18] *See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring in the judgment); *Goldberg v. Sweet*, 488 U.S. 252, 271 (1989) (Scalia, J., concurring in the judgment); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

[19] Throughout our constitutional history, other Justices who have questioned the legitimacy of the Court's broad negative Commerce

The tax at issue in this case satisfies both criteria: it facially discriminates against interstate commerce, *see* Pet. Br. 26-27, and respondents have conceded that the tax is indistinguishable from taxes the Court has invalidated under the negative Commerce Clause, *see* Br. 3. Accordingly, even if the Court were willing to revisit its negative Commerce Clause jurisprudence, this would be a particularly inapt case to use for that purpose.

Clause doctrine have similarly limited their criticism to the Court's invalidation of *nondiscriminatory* exactions. *See, e.g., Southern Pac.*, 325 U.S. at 795 (Douglas, J., dissenting) ("courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted"); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 327 (1938) (Black, J., dissenting in part) ("Until Congress . . . fixes a different policy, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and nondiscriminatory taxes upon interstate and intrastate business alike."); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 500 (1887) (Waite, C.J., dissenting) ("[t]here is no discrimination between citizens of the state and citizens of other states"); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 282 (1873) (Swayne, J., dissenting) ("That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, . . . is conclusive on the subject.").

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed. The case should be remanded for further proceedings, including the provision of meaningful backward-looking relief.

Respectfully submitted,

WALTER HELLERSTEIN
UNIVERSITY OF GEORGIA
LAW SCHOOL
Herty Drive
Athens, Georgia 30602
(706) 542-5175

CHARLES R. MORGAN
MARK D. HALLENBECK
ALBERT G. MOORE, JR.
RICHARD W. BELL
BELLSOUTH CORPORATION
Legal Department, Suite 1800
1155 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 249-2726

WALTER R. BYARS
STEINER, CRUM & BAKER
Post Office Box 668
Montgomery, Alabama 36101
(334) 832-8800

MARK L. EVANS *
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

DAVID J. BOWLING
COURTNEY HYERS
CSX TRANSPORTATION, INC.
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 782-1495

December 29, 1998

* Counsel of Record

(3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

TIMOTHY J. MCCORMALLY
Counsel of Record
MARY L. FAHEY
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W.
Suite 300
Washington, D.C. 20005-3814
(202) 638-5601
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this

"TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent nearly 2,800 of the leading businesses in the United States and Canada, nearly all of which are engaged in interstate commerce.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and due process rights of business taxpayers.

Tax Executives Institute's members have a vital interest in the resolution of this case. Even those members whose companies are not doing business in Alabama are, almost without exception, engaged in interstate commerce. Consequently, they benefit from, and are entitled to, the protection afforded by the Commerce Clause and Due Process Clause of the United States Constitution. The potential diminution of that protection—which is clearly portended by the Alabama Supreme Court's decision—is of material concern to the Institute and all its members.

SUMMARY OF ARGUMENT

This case involves the questions whether Alabama's franchise tax on out-of-state corporations contravenes the Commerce Clause of the Constitution and, further, whether the State's theory of *res judicata* operates to deny taxpay-

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brief. Tax Executives Institute has received the written consents of the Petitioners and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

ers due process. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1. The record shows that the State of Alabama has been discriminating against foreign corporations for more than eight decades. It also shows that by improperly invoking *res judicata*, the courts below unconstitutionally denied the taxpayers their due process rights.

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign, or out-of-state corporations than on domestic corporations engaged in comparable activity. *Id.* at 329. Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence of either a discriminatory purpose or a discriminatory effect justifies a finding of proscribed "economic protectionism." *Id.* at 272-73.

In contrast to Alabama's domestic franchise tax (which is based on the par value of the corporation's outstanding stock), the State's foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. As a result of the different tax bases, foreign corporations doing business in Alabama are subject to a much higher level of taxation than are similarly situated domestic corporations.

Alabama's discrimination against out-of-state taxpayers is indisputable. Indeed, not one Alabama judge who reviewed the evidence in this case held that the State's franchise tax scheme is constitutional. In spite of the statute's unconstitutionality, the trial court resorted to a strained interpretation of *res judicata* to hold that the taxpayers in this case are barred from litigating this issue. (App. B at

15a-22a.)[2] That decision should not be permitted to stand.

That Alabama's franchise tax does not pass constitutional muster was made manifest by this Court's decision two terms ago in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), in which a North Carolina intangibles tax on the fair market value of stock owned by state residents was examined. Under the state statute, residents owning stock in a corporation that earned income solely within the state paid no intangibles tax, whereas residents with stock of foreign corporations having no in-state activities paid the full amount. Because the tax was computed on a different net base depending on the corporation's in-state activities, it facially discriminated against interstate commerce. 516 U.S. at 327-28, 333 & n.3.

In light of the *Fulton Corp.* case, the Alabama Supreme Court did not hold that the tax is not discriminatory. Rather, the state supreme court simply affirmed a trial court opinion conceding the tax's discriminatory nature but denying taxpayers' constitutional right to contest it on grounds of *res judicata*—specifically, the Alabama Supreme Court's prior decision in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). Subsequent decisions of this Court demonstrate unequivocally, however, that the Alabama Supreme Court's 1989 decision in *Reynolds Metals* was wrong. *See Fulton Corp.*, 516 U.S. at 333 (1996 decision holding North Carolina's tax on stock is unconstitutional); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 104 (1994) (1994 decision holding that the failure to identify a specific charge on intrastate

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[2] "App." references are to the various appendices bound with the Petitioners' Petition for a Writ of Certiorari to the Supreme Court of Alabama in *South Central Bell Telephone Co., et al. v. State of Alabama and State Department of Revenue*, No. 97-2045 (filed June 18, 1998).

commerce equal to or exceeding charge on interstate commerce is fatal to state's claim). What is now clear—if there was ever any doubt—is that the Commerce Clause proscribes any and all discrimination, regardless of intent.

The Alabama trial court's theory of *res judicata* flies the face of the Court's 1996 decision in *Richards v. Jefferson County*, 116 S. Ct. 1761, 1764 (1996). There, the Court held that the State's interpretation of *res judicata* "deprived [the taxpayers] of the due process of law guaranteed by the Fourteenth Amendment." In this case, the trial court perpetuated the Alabama Supreme Court's error in *Richards*. Under the trial court's rationale, businesses would be forced to follow hundreds, if not thousands, of state tax cases—assuming, that is, that an adequate time-sensitive tracking system even existed. Equally troubling, the Alabama decision implies that taxpayers may have to intervene in any case that *might* tangentially affect their interests in order to preserve their rights. As an organization dedicated to minimizing the costs and burdens of tax administration, *amicus* TEI is troubled that such a suggestion might be taken seriously. The courts, too, should be concerned about the deluge of "protective" interventions that would assuredly thwart the goal of judicial economy. Finally, *amicus* TEI is concerned about the court's imposition of a more stringent standard for "large and sophisticated" taxpayers that employ "well known" counsel.

The doctrine of *res judicata* is intended to promote finality and judicial economy by precluding the relitigation of issues where the parties in interest had previously enjoyed "their day in court." As the Court explained in *Richards*, "to contend that the plantiffs in [the prior litigation] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" 116 S. Ct. at 1768 (quoting *Hansberry v. Lee*, 311 U.S. 32, 46 (1940)). Further-

more, the doctrine does not apply when superseding decisions of this country's highest court have repudiated the basis for the original decision. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). The decision below represents an extreme application of *res judicata* in violation of the Due Process Clause.

Viewed in isolation, the decision below is troubling for it suggests a willingness to trample upon the constitutional rights of interstate businesses in order to preserve the vestiges of a discriminatory taxing scheme. Viewed more broadly, consternation becomes despair, for this case represents just another step in States' efforts to avoid paying taxpayers what they are rightly owed—the refund of an unconstitutional tax.

In this case, the Supreme Court of Alabama distended *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama prevails here, state courts will become a place where the rules no longer matter. If taxpayers win by the rules, the States will consider themselves free to change them. Such a result cannot be permitted.

After this Court's opinion in *Richards*, Alabama's refusal to craft meaningful relief can only be viewed as defiance. Only five months ago, in *Newsweek v. Florida Department of Revenue*, 118 S. Ct. 904 (1998), this Court signalled its growing irritation with state courts that flout its mandates. *Amicus* TEI submits that this case is similar. Because the Alabama decision is both wrong and unsettling, it should not be allowed to stand. Accordingly, the Court should grant the petition for a writ of certiorari and reverse the decision below.

ARGUMENT

I.

This case involves the questions whether the State of Alabama's franchise tax on foreign, or out-of-state, corporations contravenes the Commerce Clause of the Constitution and whether the State's interpretation of the doctrine of *res judicata* operates to deny the taxpayers due process. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1. The record shows that the State of Alabama has been discriminating against foreign corporations for more than eight decades. The record also demonstrates that the State's courts have engaged in adjudicatory legerdemain to deny taxpayers due process and hence shield Alabama's violation of constitutional rights from correction.

Foreign corporations doing business within the State of Alabama are subject to a franchise tax based on "the actual amount of . . . capital employed" in the State. ALA. CODE § 40-14-41(a) (1993) (App. G at 91a); *see* ALA. CONST. art. XII, § 232 (1901). The Alabama Code defines "capital" to include not only the par value (or stated value) of the foreign corporation's outstanding capital stock, but also its surplus and undivided profits, long-term debt, certain related-party debt, and accelerated depreciation. ALA. CODE § 40-14-41(b) (1993) (App. G at 91a-92a). Capital employed in Alabama is determined by apportioning total capital to Alabama on the basis of a three-factor formula (property, payroll, and sales). ALA. ADMIN. CODE r. 810-2-3.11 (1991) (App. G at 106a).

Domestic corporations are also subject to an annual franchise tax for the privilege of doing business within Alabama, but the base upon which the domestic tax is computed differs materially from the foreign franchise tax base. Specifically, the domestic tax is imposed solely on the amount of the domestic corporation's "capital stock," which means the aggregate par value of the

domestic corporation's outstanding stock. ALA. CODE § 40-14-40 (1993) (App. G at 90a); *see* ALA. CONST. art. XII, § 229 (1901); *White v. Reynolds Metals Co.*, 558 So. 2d 373, 374 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). Because the Alabama Code permits domestic corporations to issue stock of low or no par value, those corporations may reduce their franchise tax liability to as little as $50 without changing their size, total capitalization, or the extent of their business activity within or without Alabama—any of which would affect an out-of-state corporation's tax liability. *See* ALA. CODE § 40-14-40 (1993) (App. G at 90a) (domestic franchise tax shall be no less than $50); Stip. Facts ¶¶ 21-23 (App. D at 52a-53a) (corporation may control amount of domestic franchise tax by assigning any value to par value or stated value of its capital stock).

Thus, whereas the domestic franchise tax is based on the par value of the corporation's outstanding stock (which under Alabama law is subject to a domestic taxpayer's control), the foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. The domestic tax rate is $10 per $1,000 of capital stock while the foreign tax rate is $3 per $1,000 of capital employed.

As a result of the different tax bases, foreign corporations doing business in Alabama are subject to a substantially higher level of taxation than are similarly situated domestic corporations. The trial court below accepted a study introduced by taxpayers documenting that the Alabama franchise tax statutes in fact discriminate in favor of domestic corporations. (App. B at 21a n.7 & App. C at 34a-38a.) The study determined that if domestic corporations had been subject to the franchise tax imposed on foreign corporations, the liability of the domestic entities would have been five times higher than it actually was. (App. C at 36a.) For example, the percentage of discrimination in 1988 was 411.11 percent and in 1991, 509.15 percent. *Id.*

The magnitude and consequence of Alabama's discrimination here are indisputable. Indeed, not one Alabama judge who reviewed the evidence in this case concluded or even intimated that the State's franchise tax scheme is constitutional. As the trial court conceded:

> [T]he Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation. Accordingly, the Court finds that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution.

(App. B at 21a-22a) (footnote omitted).

In spite of the statute's unconstitutionality, the trial court resorted to an extreme application of *res judicata* to bar the taxpayers in this case from litigating this issue. (App. B at 17a-19a.) The Alabama Supreme Court affirmed the decision without opinion. (App. A at 1a.)

II.

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign corporations than on domestic corporations engaged in comparable activity. *Id.* at 329 ("[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects" [citations omitted]); *see Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72-74 (1963). Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence

of either a discriminatory purpose or a discriminatory effect justifies a finding of proscribed "economic protectionism." *Id.* at 272-73. Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 101 (1994).

That Alabama's franchise tax does not pass constitutional muster was made manifest by this Court's decision two terms ago in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), in which a North Carolina intangibles tax on the fair market value of stock owned by state residents was examined. Although the tax was assessed at a stated rate, residents could calculate their tax liability by taking a taxable percentage deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina. Under this scheme, residents owning stock in a corporation that earned income solely within the state paid no intangibles tax, whereas residents with stock of foreign corporations having no in-state activities paid the full amount. Because the tax was computed on a different net base depending on the corporation's in-state activities, it facially discriminated against interstate commerce. 516 U.S. at 327-28, 333 & n.3. *See Maryland v. Louisiana*, 451 U.S. at 760) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"). Moreover, the tax could not stand as a "compensatory" levy [3] because, as the Court explained, "[s]tate laws discriminating against interstate

[3] There are three conditions for finding that a facially discriminatory tax is compensatory. First, a State must identify the intrastate tax burden for which the State is attempting to compensate. Second, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Fulton Corp.*, 516 U.S. at 332-33.

commerce on their face are 'virtually *per se* invalid.'" 516 U.S. at 331 (citations omitted).

In light of the *Fulton Corp.* case, it is clear that the Alabama "franchise tax facially discriminates against interstate commerce, and arguments over the degree of discrimination do not affect this characterization." (App. A at 13a) (Maddox, J., dissenting). The Alabama Supreme Court did not rule otherwise. Rather, that court hid behind a lower court opinion conceding the tax's discriminatory nature but denying taxpayers' constitutional right to contest it on the grounds of *res judicata*. The only inference to be drawn from the Alabama Supreme Court's aversion to reaching the merits of the statute is that it recognized the futility of that inquiry under the Commerce Clause.

III.

The trial court ruled that the taxpayers here were precluded from litigating the constitutionality of the franchise tax because of the Alabama Supreme Court's prior decision in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). In *Reynolds Metals*, the court found that the franchise tax scheme did not violate the Commerce Clause. In rationalizing its conclusion, the court referred to several purposes for imposing foreign and domestic franchise taxes on different bases:

> ease of regulation and enforcement, differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations.

Id. at 389. The court also cited statements by the Chief of the Franchise Tax Division of the Alabama Department of Revenue that foreign corporations could reduce the amount of their franchise tax liability "merely by forming domestic corporate subsidiaries in this state or

by becoming Alabama corporations themselves." *Id.* at 384.

Subsequent decisions of this Court demonstrate unequivocally that the Alabama Supreme Court's 1989 decision in *Reynolds Metals* was wrong. *See Fulton Corp.*, 516 U.S. at 346 (1996 decision holding that North Carolina's tax on stock is unconstitutional); *Oregon Waste*, 511 U.S. at 104 (1994 decision holding that the failure to identify a specific charge on intrastate commerce equal to or exceeding charge on interstate commerce is fatal to State's claim). What is now clear—if there was ever any doubt[4]—is that the Commerce Clause does not sanction *any* discrimination, regardless of magnitude or intent. In this case, the Alabama trial court labored to fit the square peg of its *Reynolds Metals* decision into the round hole of the Constitution, but it employed Jabberwockian logic to apply *res judicata* in a manner that makes sense only if one does not think about it.

IV.

In reaching its conclusion that this action is barred by *res judicata*, the trial court below seriously misapprehended

[4] The state court's rationale was suspect even before these cases were decided. In *Reynolds Metal*, the Alabama court erroneously equated the standards under which equal protection and Commerce Clause challenges are to be judged. In point of fact, two very different and distinct standards are to be applied: whereas a statute may withstand attack on equal protection grounds where a classification is "rationally related to [a legitimate state] purpose," *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985), the Commerce Clause proscribes *all* taxes that discriminate against interstate commerce, without regard to whether the discrimination is pervasive or intentional, *Maryland v. Louisiana*, 451 U.S. at 760. *See also Halliburton Oil Well Cementing Co.*, 373 U.S. at 73 ("we see no reason to depart from the strict rule of equality"); *Bacchus Imports*, 468 U.S. at 273 ("it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers").

this Court's decision in *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996). In doing so, it denied the taxpayers their federal due process rights. U.S. CONST. amend. XIV, § 1.

In considering the Alabama court's theory of *res judicata* here, the Court will no doubt experience an uncanny sense of *déjà vu*. In *Richards*, the taxpayers challenged the constitutionality of a county occupation tax on both state and federal grounds. The county moved for summary judgment on the grounds that the taxpayers' claims were barred by a prior adjudication of the tax by a city director of finance. The trial court granted the county's motion on the state constitutional claims, but refused to do so on the federal claims, which had not been considered in the earlier case. On appeal, Alabama's highest court held that the federal claims were also barred.[5]

In its opinion in *Richards*, this Court unanimously found that Alabama's interpretation of *res judicata* "deprived [the taxpayers] of the due process of law guaranteed by the Fourteenth Amendment." 116 S. Ct. at 1764. In explaining this conclusion, the Court invoked the traditional rule that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* at 1765 (citation omitted).

Confirming that the "opportunity to be heard is an essential element of due process of law in judicial proceed-

[5] The court reasoned that (i) the complaint in the earlier case had alleged that the county tax violated the Equal Protection Clause of the U.S. Constitution and an equal protection argument had been made in the briefs; (ii) the taxpayers in the prior case adequately represented petitioners because their respective interests were "essentially identical"; and (iii) the county had relied on the prior case in pledging tax revenues and issuing bonds. *Richards v. Jefferson Cty.*, 662 So.2d 1127, 1130 (Ala. 1995), *rev'd*, 116 S. Ct. 1761 (1996).

ings," the Court dismissed the Alabama court's conclusion that *res judicata* applied because the parties were adequately represented in the prior suit. 116 S. Ct. at 1765 n.4 & 1767. To have a binding effect on absent parties, the Court stated, a prior proceeding must at least be—

> so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

Id. at 1767 (quoting *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)). This requirement was absent in *Richards* because (i) the taxpayers did not sue on behalf of a class, (ii) they did not assert any claim against or on behalf of a class, and (iii) the judgment they received did not purport to bind taxpayers who were not parties to the litigation. 116 S. Ct. at 1767.

In this case, the trial court perpetuated Alabama's error in *Richards*. Specifically, the court misconstrued *Richards* as holding the application of *res judicata* improper only because the petitioners did not receive notice of the prior litigation and were not sufficiently represented in that case. (App. B at 18a.) The trial court averred that the taxpayers here are "large and sophisticated" corporations "well informed in all matters involving issues of national and state taxation and . . . well informed of significant pending legal actions and court decisions." *Id.* Because the taxpayers were aware of the *Reynolds Metals* case at the time it was being litigated and because the taxpayers in that prior case were represented by "well known and excellent counsel"—and, indeed, were represented by the same counsel—the court lowered the bar of *res judicata*, insisting its action did not violate the taxpayers' due process rights. (App. B at 19a.)

Although facile and somewhat beguiling, the trial court's decision does not withstand scrutiny. Not only did the court exaggerate the extent and significance of the overlap of counsel in *Reynolds Metals* and the instant case, but its reasoning is specious.

First, although it is true that one of the petitioners' counsel represented the taxpayers in the *Reynolds Metals* case, the attorney's involvement in the earlier case was limited to seeking a writ of certiorari in this Court. In other words, he did not appear in the Alabama courts. More fundamentally, the Alabama trial court here misapprehends the core purpose of *res judicata*. The doctrine is intended to promote finality and judicial economy by precluding the relitigation of issues where the parties in interest had previously enjoyed "their day in court." *See Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Even assuming the taxpayers here had knowledge of the *Reynolds Metals* case (and the record confirms that they did not become aware of the earlier case until after the trial court's decision), the court's assumption that interstate businesses can and should keep track of all cases potentially affecting them is at once perverse and preposterous. Under the court's rationale, corporate taxpayers would be forced to follow hundreds, if not thousands, of state tax cases—assuming, that is, that an adequate, time-sensitive tracking system existed. And it does not. Indeed, in many jurisdictions, trial court jurisprudence is not even published, and the only way a taxpayer could know for sure about such cases would be to travel perpetually from courthouse to courthouse, reviewing every complaint or other pleading lodged in a case. Such a clog in interstate commerce is constitutionally unacceptable. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Even more troubling, the Alabama decision implies that taxpayers should stand ready to intervene in any case tangentially affecting their interests in order to preserve their rights. As an organization dedicated to minimizing the costs and burdens of tax administration to the common benefit of government and taxpayers, *amicus* TEI is astounded that such an impractical and wasteful suggestion might be taken seriously. The courts, too, should be concerned about the flood of "protective" interventions that would assuredly thwart the goal of judicial economy.

Moreover, *amicus* TEI is concerned about the practical effect of the trial court's imposing a more stringent standard on "large and sophisticated" taxpayers who employ "well known" counsel. Will large corporations now be forced to prove they were nevertheless unsophisticated about tax matters in order to safeguard their right to dispute unconstitutional taxes? That their advisers are not well known? Will all large corporations be assumed in privity with one another and to share the same concerns (even though circumstance shows that often not to be the case)? Will small, but sophisticated corporations be subject to the same standard? *Amicus* TEI submits that the size and sophistication of corporate taxpayers, as well as the employment of experienced counsel, should be wholly irrelevant to the assertion—and vindication—of constitutional rights against discriminatory taxation.

Alabama's own case law holds that the doctrine of *res judicata* should be used sparingly to preclude judicial review in tax cases involving different years. *Alabama v. Plantation Pipe Line Co.*, 89 So.2d 549, 569 (Ala.), *cert. denied*, 352 U.S. 943 (1956). This is particularly true for cases involving different tax years *and* different taxpayers. *See Richards*, 116 S. Ct. at 1768. As the Court explained in *Richards*, "to contend that the plaintiffs in [the prior litigation] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" 116 S. Ct. at 1768 (quoting *Hansberry*, 311 U.S. at 46). The doctrine simply does not apply when superseding decisions of this country's highest court have repudiated the basis for the original decision. *Sunnen*, 333 U.S. at 599 (*res judicata* or estoppel by judgment "is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers"). The decision below represents an extreme application of *res judicata* in violation of the Due Process Clause. It should be summarily reversed.

V.

Viewed in isolation, the decision below is troubling for it suggests a willingness to trample upon the constitutional rights of interstate businesses in order to preserve the vestiges of a discriminatory taxing scheme. Viewed more broadly, consternation transmutes into despair, for this case represents just another step in States' efforts to avoid providing meaningful relief to aggrieved taxpayers. The last 15 years have seen States propound many an original and unfounded argument to deny taxpayers relief.[6] In many ways these cases are dissimilar. They involved different types of statutes (though with one exception, they all implicated the Commerce Clause rights of interstate businesses). But there are two attributes they generally share. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was imposed (or imposed to a different extent) on a favored class of taxpayers. Secondly, each triggered the same reaction by one or more of the States that imposed the unconstitutional taxes: an effort to avoid the conse-

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[6] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports*, 468 U.S. at 273 (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co.*, 470 U.S. at 882-83 (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); and *Fulton Corp.*, 516 U.S. at 346 (North Carolina intangibles tax on fair market value of stock). *See also McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (retroactivity of decision overturning Florida statute exempting local products from liquor excise tax); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (retroactivity of a case striking down a Georgia statute); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (retroactivity of a Supreme Court case); *Reich v. Collins*, 513 U.S. 106 (1994) (same); *Newsweek v. Florida Dep't of Rev.*, 118 S. Ct. 904 (1998) (vacating a decision of the Florida Supreme Court barring the taxpayer from pursuing a refund claim); *Dryden v. Madison Co.*, 118 S. Ct. 1162 (1998) (remanded in light of the *Newsweek* case).

quences of their unconstitutional acts, either by applying the Court's holdings on a prospective-only basis or by construing the States' refund statutes to render pyrrhic the taxpayers' constitutional victory. Now Alabama is trying a new tack: donning judicial blinders to deny taxpayers access to a forum to press their righteous claims.

Obviously, it is not for a lower court to determine that a valid Supreme Court precedent need not be followed. *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring). *Accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867) (if the lower court did not adhere to Supreme Court precedent, there would be "mischievous consequences"). Stated simply, that Alabama's courts should arrogate this duty to themselves is to punctuate their failure to appreciate the core values of the federal system and the Supremacy Clause. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 527 (extraterritorial taxation offends fundamental notions of due process and constitutes an "unreasonable clog upon the mobility of commerce"). The States should not be permitted to nullify the mandates of this Court by conjuring up one excuse after another for refusing to return to taxpayers what they had no right to take in the first place.

In this case, the Supreme Court of Alabama embraced a bogus theory of *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama prevails here, state courts will become Wonderland, a place where the rules no longer matter. If taxpayers win by the rules, the States—like the Queen of Hearts in her game of croquet [7] —will consider themselves free to change them. The stakes here, however, are much greater than those encountered in a fanciful game of croquet.

After this Court's opinion in *Richards*, Alabama's refusal to craft meaningful relief can only be viewed as

[7] *See* Lewis Carroll (Charles L. Dodgson), *Alice's Adventures in Wonderland*, ch. VIII (1865) (The Queen's Croquet-Ground).

defiance. Only five months ago, in *Newsweek v. Florida Department of Revenue*, 118 S. Ct. 904 (1998), this Court signalled its growing irritation with state courts that resist its mandates. In that case, the State of Florida refused to refund an unconstitutional tax on magazines on the grounds that the taxpayer should have pursued a predeprivation process to challenge the tax scheme. The state court, however, sought to ignore a refund statute that, until that time, had been readily available to the taxpayer. This Court not only granted Newsweek's petition for a writ of certiorari, but also refused argument and summarily vacated the opinion in a *per curiam* decision. In doing so, the Court reiterated its holding in *Reich v. Collins*, 513 U.S. 106 (1994) that "a State may not 'bait and switch' by 'hold[ing] out what plainly appears to be a 'clear and concise' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." 118 S. Ct. at 904 (quoting *Reich*, 513 U.S. at 111, 108). *See also Dryden v. Madison Co.*, 118 S. Ct. 1162 (1998) (remanded in light of the *Newsweek* case).

The purpose of the Due Process Clause is to protect constitutional rights against arbitrary actions by the government, but what is more arbitrary than using distended legal principles to deny an opportunity to be heard? What is more arbitrary than consigning taxpayers to the role of Sisyphus, contending that no matter how far up the mountain they role the stone of refund suits, the State remains at liberty to claim it was not far enough and to push the stone down the mountainside. In *Richards*, this Court admonished Alabama against distorting the doctrine of *res judicata* to prevent taxpayers from seeking redress of wrongs in a court of law. But the courts below did not hear.

Amicus TEI submits that the parallels between this case and *Newsweek* are compelling. The courts below have admitted that the Alabama franchise tax is unconsti-

tutional. But they have nevertheless denied taxpayers relief, raising a spurious procedural obstacle that was rejected outright in *Richards*. And they have done so, betting that this Court will decline to issue a writ of certiorari. Its gambit should not succeed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

TIMOTHY J. MCCORMALLY
Counsel of Record
MARY L. FAHEY
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W.
Suite 300
Washington, D.C. 20005-3814
(202) 638-5601
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

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No. 97-2045

In The

Supreme Court of the United States

October Term, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,

Petitioners,

vs.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

MOTION OF *AMICI CURIAE* ALLIEDSIGNAL INC., AVON PRODUCTS, INC., BURGER KING CORPORATION, CYTEC INDUSTRIES, INC., DARDEN RESTAURANTS, ELI LILLY AND COMPANY, GEORGIA-PACIFIC CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, MORTON INTERNATIONAL, INC., NABISCO, INC., PICCADILLY CAFETERIAS, INC., R.J. REYNOLDS TOBACCO COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND TRICON GLOBAL RESTAURANTS, INC. IN SUPPORT OF PETITION AND BRIEF *AMICI CURIAE*

WILLIAM L. GOLDMAN
Counsel of Record
CARL R. ERDMANN
McDERMOTT, WILL & EMERY
Attorneys for Amici Curiae
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

147471

(800) 274-3321 • (800) 359-6859
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Lutz Appellate Services, inc.

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AlliedSignal Inc., Avon Products, Inc., Burger King Corporation, Cytec Industries Inc., Darden Restaurants, Eli Lilly and Company, Georgia-Pacific Corporation, Matsushita Electric Corporation of America, Morton International, Inc., Nabisco, Inc., Piccadilly Cafeterias, Inc., R.J. Reynolds Tobacco Company, The Prudential Insurance Company of America, and Tricon Global Restaurants, Inc. ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the Supreme Court of Alabama. *Amici* are filing this motion because Respondents have declined to consent to this *amicus curiae* brief.[1] A copy of the proposed brief is attached.

As more fully explained at pages 1-2 of the attached brief under "Interest of *Amici Curiae*," *amici* are corporations incorporated in States other than Alabama and conduct business in interstate commerce, including in Alabama. All suffer the effects of Alabama's discriminatory franchise tax since they are forced to bear a heavier franchise tax burden than competing corporations that are incorporated in Alabama.

The brief will assist the Court in determining whether to grant *certiorari* because *amici* are uniquely positioned to point out: (1) the importance of this case to all foreign corporations doing business in Alabama in view of Alabama's continuing enforcement of its discriminatory taxing scheme; (2) the need to for this Court to grant *certiorari* in this case in view of Alabama's inability to comply voluntarily with clear precedent of this Court; and (3) the challenge to the integrity of this Court's decisions in view of (i) Alabama's continuing reliance on its earlier decision in *White v. Reynolds Metal Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990) ("*Reynolds*"), despite subsequent decisions

1. In response to a request for consent of Respondents to the filing of an *amicus curiae* brief, Respondents' counsel replied by letter of July 14, 1998, that "the Alabama Revenue Department respectfully declines to consent to your filing an Amicus Brief on behalf of your clients who are not parties to this litigation."

of this Court that have repudiated *Reynolds*; and (ii) Alabama's use of *res judicata* to block attempts by taxpayers who were strangers to *Reynolds* from obtaining judicial review of Alabama's unconstitutional tax, a denial of due process that also conflicts directly with a decision of this Court. Given Respondents' position on the *res judicata* issue (*i.e.*, that non-parties are bound by *Reynolds*), it is particularly ironic that Respondents would not consent to this brief on the grounds that *amici* were "not parties to this litigation."

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief *amici curiae.*

Respectfully submitted,

WILLIAM L. GOLDMAN
Counsel of Record
CARL R. ERDMANN
McDERMOTT, WILL & EMERY
Attorneys for Amici Curiae
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

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CONSENT OF THE PARTIES

Petitioners have consented to the filing of this *amicus curiae* brief, but Respondents have declined to consent. *Amici*, therefore, have filed a motion for leave to file this brief in accordance with S. Ct. R. 37.2(b).[1]

INTEREST OF *AMICI CURIAE*

Pursuant to S. Ct. R. 37, AlliedSignal Inc., Avon Products, Inc., Burger King Corporation, Cytec Industries Inc., Darden Restaurants, Eli Lilly and Company, Georgia-Pacific Corporation, Matsushita Electric Corporation of America, Morton International, Inc., Nabisco, Inc., Piccadilly Cafeterias, Inc., R.J. Reynolds Tobacco Company, The Prudential Insurance Company of America, and Tricon Global Restaurants, Inc. ("*amici*") respectfully submit this brief as *amici curiae* in support of the petition for a writ of *certiorari* filed by Petitioners in the above-captioned case.

Amici, corporations organized under laws of States other than Alabama (referred to herein as "foreign corporations"), are engaged in interstate commerce, including doing business in Alabama. Consequently, *amici* are subject to the discriminatory Alabama franchise tax on foreign corporations. Ala. Code § 40-14-41 (1993). This case is important to *amici* because Alabama continues to collect this tax from *amici* in reliance on *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990) ("*Reynolds*"). This places *amici* at a competitive disadvantage to corporations engaged in business in Alabama that are organized under the laws of Alabama (referred to herein as "domestic corporations").

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1. The letters from counsel for Petitioners and Respondents have been filed with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Furthermore, in view of Alabama's continuing exploitation of *Reynolds* in collecting the tax, asserting *res judicata* in this case, and contending that any relief should be prospective only if the tax is ever declared unconstitutional, it is particularly important to *amici* that this Court grant *certiorari* in this case. Otherwise, it is apparent that Alabama will continue to levy and collect its clearly unconstitutional tax for as long as possible, and it is doubtful whether Alabama will ever comply voluntarily with the Commerce Clause[2] precedents of this Court. In the meantime, *amici* are at risk that future litigation efforts in Alabama will be similarly frustrated by the contentions Alabama has made in this case. *Amici*, like other foreign corporations in Alabama, intend to pursue claims for refunds of franchise tax for past years.

SUMMARY OF ARGUMENT

Alabama's continuing reliance on *Reynolds* to justify its discriminatory taxing scheme (despite subsequent decisions of this Court) and Alabama's resort to *res judicata* to avoid judicial review (also in conflict with a decision of this Court) are an affront to this Court's Commerce Clause jurisprudence. This Court should grant *certiorari* to protect the integrity of its decisions.

Alabama's "extreme application" of *res judicata* directly conflicts with *Richards v. Jefferson County*, 517 U.S. 793 (1996) by depriving Petitioners, who were strangers to *Reynolds*, of due process. In addition, Petitioners are deprived of the ability to rely on both subsequent Commerce Clause decisions of this Court and further factual development, a harsher result than applies to the parties themselves in an earlier tax case. This further compounds the unconstitutionality of the result below.

2. U.S. Const. art. I, § 8, cl. 3.

The unconstitutionality of Alabama's discriminatory taxation of foreign corporations has been confirmed by subsequent decisions of this Court, which have repudiated the constitutional analysis in *Reynolds*. Consequently, it is important for this Court to grant *certiorari* in order to bring Alabama's reliance on *Reynolds* to an end.

Finally, in view of still more precedent of this Court confirming a State's obligation to provide meaningful backward-looking relief, this Court also should reject Alabama's arguments for prospective relief only. Alabama must not be permitted to ignore this Court's precedent and then retain its unconstitutional tax collections.

ARGUMENT

THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE RULING OF THE ALABAMA SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND, UNDER THE CIRCUMSTANCES HERE, *CERTIORARI* IS PARTICULARLY WARRANTED IN ORDER TO PROTECT THE INTEGRITY OF THIS COURT'S DECISIONS.

It is important for this Court to grant *certiorari* in this case because of Alabama's continuing reliance on and continuing exploitation of *Reynolds* — a 1989 decision that is unquestionably in direct conflict with this Court's subsequent decisions in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) ("*Fulton*"); *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) ("*Oregon Waste*"); and *Associated Indus. v. Lohman*, 511 U.S. 641 (1994) ("*Associated Industries*").[3]

3. This case involves a direct "conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law [which] is a strong reason for the granting of certiorari." R. Stern, et al., *Supreme*

(Cont'd)

Every position Alabama takes with respect to every issue (including *res judicata*, the constitutionality of its discriminatory franchise tax on foreign corporations, and the relief to be accorded taxpayers if the tax ultimately is held to be unconstitutional) is grounded on the State's continued reliance on *Reynolds*. Furthermore, Alabama's arguments in this case confirm that all future litigation in Alabama involving these issues also will be infected by the State's claim that, until *Reynolds* is directly overruled, the State is entitled to continue to rely on *Reynolds* in collecting and then retaining the franchise taxes paid by foreign corporations. As noted by Justice Maddox in his concurring opinion, the only opinion issued by a member of the majority in the Alabama Supreme Court:

> [A]lthough I realize that the [United States] Supreme Court has released some opinions that could be interpreted as indicating a change in that Court's view of the constitutionality of state taxes such as that at issue in this case, the fact remains that the Supreme Court refused to review this Court's decision in *Reynolds Metals*, and that, as of today, *Reynolds Metals* remains the law.

South Central Bell Co. v. Dept. of Revenue, Pet. App. 7a.[4]

(Cont'd)
Court Practice 208 (7th ed. 1993); *see also* S. Ct. R. 10. The Alabama Supreme Court's disregard of clear precedent of this Court bears striking resemblance to the Ohio Supreme Court's actions in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984), where this Court granted *certiorari* because "a state court has disregarded a federal constitutional ruling of this Court." *Id.* at 362; *see also Hudson v. Louisiana*, 450 U.S. 40, 42 (1981); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974); *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72 (1974).

4. "Pet." references are to the petition for a writ of *certiorari* filed in this case. "Pet. App." references are to the appendices to the petition.

It is intolerable for a State to continue in this fashion to ignore and avoid the clear, unequivocal constitutional directives of this Court. Such intransigence itself raises a serious Commerce Clause concern. A State must not think that, because of an earlier decision in that State, it may ignore with impunity subsequent decisions of this Court and collect plainly unconstitutional taxes. That is exactly what Alabama is doing.

Apparently, Alabama thinks that *Fulton*, *Oregon Waste*, and *Associated Industries* apply everywhere in the United States except in Alabama and that it is permanently shielded from further Commerce Clause precedent of this Court because of the 1989 decision in *Reynolds*. Such a notion is a direct affront to the Commerce Clause because it would result in varying levels of constitutional protection depending upon the State in which business is conducted.[5]

Under these circumstances, it is important for this Court to grant *certiorari* in order to protect the integrity of its decisions. Alabama must be told that it must conform its taxing practices to the requirements of the Commerce Clause as clearly stated

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5. This Court has repeatedly recognized the necessity of treating the Nation as one economic unit.

> [I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Oregon Waste at 98 (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979)); *see generally* The Federalist No. 42 (James Madison). "[O]ur economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, . . . [and] has as its corollary that the states are not separable economic units." *Oregon Waste* at 98-99 (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949)).

by this Court. Otherwise, Alabama will be rewarded for its intransigence, and other States will be encouraged to hold out for as long as possible in similar circumstances in the hope of retaining their unconstitutional gains.

In this case, the decision of the Alabama Supreme Court is particularly egregious in view of the multiplicity of decisions of this Court with which it is in direct conflict.

1. The fact that Alabama's "extreme application" of *res judicata* prevents taxpayers who were strangers to the *Reynolds* case from relying on subsequent Commerce Clause decisions of this Court compounds the unconstitutionality of the result below.

Alabama's application of *res judicata,* in effect, creates a new, unprecedented class action — a class of all foreign corporations doing business in Alabama — without any of the usual class action protections. *See* Fed. R. Civ. P. 23. Petitioners have demonstrated that the *res judicata* issue warrants this Court's review in light of the direct conflict with this Court's decision in *Richards v. Jefferson County*, 517 U.S. 793 (1996), another case from Alabama. *See* Pet. 19-24. As in *Richards*, the "extreme application" of *res judicata* to Petitioners in this case "deprived them of the due process of law guaranteed by the Fourteenth Amendment." *Id.* at 797.

Amici wish to point out that the "extreme application" of *res judicata* in this case also has the effect of preventing taxpayers, who were strangers to the *Reynolds* case, from being able to rely on subsequent Commerce Clause precedent of this Court, including cases that are directly contrary to *Reynolds*. It is hard to imagine a more "extreme application" of *res judicata* given the general recognition that the parties themselves in an earlier tax case are not prevented from relying on such

subsequent decisions of this Court when later tax years are litigated. *See Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984) ("*Hooven II*"); *Commissioner v. Sunnen*, 333 U.S. 591 (1948); *see also State v. Plantation Pipeline Co.*, 265 Ala. 69, *cert. denied*, 352 U.S. 943 (1956).

In *Sunnen*, this Court rejected the attempt by the Commissioner of the Internal Revenue Service to invoke collateral estoppel in a later tax year, noting that collateral estoppel —

> is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to created vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

Sunnen, 333 U.S. at 599 (emphasis added).[6] It is interesting to note that there was no suggestion that the more preclusive doctrine of *res judicata* was potentially applicable.

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6. In the present case, intervening developments of both the law and significant facts have occurred. As discussed below in part 2, the legal basis upon which *Reynolds* was decided was unequivocally rejected by this Court in *Fulton*, *Oregon Waste*, and *Associated Industries*. Further, the Alabama Supreme Court based the decision in *Reynolds* in part upon an asserted lack of proof that the franchise tax in fact discriminates against foreign corporations. *Reynolds*, 558 So. 2d at 370. The trial court in this case found no such evidentiary gaps.

> The Court finds that the Taxpayer's evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation.

Pet. App. 21a-22a (footnote omitted). Therefore, intervening developments in both the law and the facts have occurred, a circumstance that would render collateral estoppel inapplicable if the parties were the same.

The result in *Hooven II* is particularly illuminating. In *Hooven II*, the taxpayer argued that the Ohio Tax Commissioner was barred by collateral estoppel because of the prior holding in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) ("*Hooven I*"), which held that the "original package" doctrine of the Import-Export Clause of the United States Constitution prevented the State from taxing certain imported goods. However, the original package doctrine was subsequently invalidated in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), although the Court never specifically overruled *Hooven I*. The Ohio Supreme Court agreed with the taxpayer's argument that, notwithstanding the intervening decision of this Court, the Commissioner was collaterally estopped from re-litigating the validity of the original package doctrine in *Hooven II* because *Hooven I* dealt with the same issues and the same taxpayer. In reversing, this Court held that

> [t]he years involved in this tax case, however, are not the same tax years at issue in *Hooven I*. Because of this, *Commissioner v. Sunnen, supra,* is pertinent and, indeed, is controlling . . .

Hooven II, 466 U.S. at 362. This Court held that collateral estoppel could not repudiate this Court's intervening pronouncement, noting that the reason for limiting the scope of collateral estoppel is especially strong when important constitutional issues are involved and the "constitutional analysis of the earlier case is repudiated by this Court's intervening pronouncement." *Id.*

In this case, Alabama argued for *res judicata* so that it could avoid both the unmistakable impact of this Court's decisions in *Fulton, Oregon Waste,* and *Associated Industries* (which have repudiated the constitutional analysis of *Reynolds*) and Petitioners' further factual development. Thus, in addition to being in direct conflict with *Richards*, the "extreme application" of *res judicata* also is contrary to *Sunnen* and plainly a denial of due process. How can a stranger to an earlier decision be more bound by that decision in dealing with different taxable years than the parties to that decision would be? This Court should not permit its decisions to be avoided in this way.

2. Alabama inappropriately relies on *Reynolds* to avoid compliance with this Court's subsequent decisions in *Fulton, Oregon Waste,* and *Associated Industries.*

Alabama's principal defense of its facially discriminatory treatment of foreign corporations against Commerce Clause challenge is its reliance on the compensatory or complementary tax doctrine as applied in *Reynolds*. In setting forth its complementary tax argument in its brief in this case to the Alabama Supreme Court, the State made no fewer than 18 references to *Reynolds*. State Department of Revenue's Brief to Ala. Sup. Ct. ("DOR Brief"), pp. 23-34 (May 25, 1997).

But, the subsequent opinions of this Court in *Fulton, Oregon Waste,* and *Associated Industries*, which more fully delineated the three requirements for application of the compensatory or complementary tax doctrine, directly repudiate the Alabama Supreme Court's analysis in *Reynolds*. For example, in *Reynolds,* the Alabama Supreme Court stated:

> The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations. We emphasize the term "invidiously" because the tax will be sustained if its classifications are rationally related to a legitimate state purpose and because, in

> enacting taxing statutes, legislatures are not required to reach equality with mathematical precision.

558 So. 2d at 382. But, in *Associated Industries*, this Court rejected as irrelevant the State's motive in enacting a tax, stating:

> A court need not inquire into the purpose or motivation behind a . . . law in order to determine that, in actuality, the law impermissibly discriminates against interstate commerce.

511 U.S. at 641. This Court also confirmed, in *Associated Industries*, that there is a "strict rule of equality" in applying the complementary tax doctrine. The State must show that its tax on interstate commerce does not exceed its tax on intrastate commerce. 511 U.S. at 646.

The Alabama Supreme Court in *Reynolds* also failed to analyze, as required by this Court's decisions, whether the taxes in issue (the domestic franchise tax and the domestic shares tax paid by domestic corporations and the foreign franchise tax paid by foreign corporations) were imposed on "substantially equivalent events" so that they served "as mutually exclusive 'prox[ies]' for each other." *Oregon Waste*, 511 U.S. at 103; *Fulton*, 516 U.S. at 340 n.6. The franchise tax on domestic corporations is imposed on their capital stock regardless where they engage in business, whereas the franchise tax on foreign corporations is imposed on the amount of their capital employed in Alabama.[7] A domestic corporation's issuance of capital stock and the employment of capital in a State are not substantially equivalent events. If Alabama wants to tax corporations on the amount of their capital employed in Alabama, it can and should impose such a tax on a nondiscriminatory basis on both domestic

7. Ala. Code § 40-14-40 and Ala. Code § 40-14-41 are set forth at Pet. App. 90a-97a.

and foreign corporations. Until it does so, a separate decision to tax domestic corporations on their capital stock cannot serve as a basis for taxing only foreign corporations on their capital employed in Alabama.[8]

Rather than address the three requirements for application of the complementary tax doctrine, as applied by this Court's post-*Reynolds* decisions, Alabama essentially argues that these decisions "do not constitute a significant (if any) departure from the standards in effect at the time" *Reynolds* was decided. DOR Brief, p. 32. That argument would merely confirm that *Reynolds* was wrong when it was decided. But the point here is that, in all events, taxpayers are entitled to have *Reynolds* reconsidered in light of this Court's subsequent decisions. That is what Alabama seeks to avoid — for as long as possible.

8. This Court has made it clear that —

> the concept of the compensatory tax . . . is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.

Oregon Waste at 102 (emphasis added). There is no justification for using different tax bases for taxing foreign and domestic corporations in this case since a nondiscriminatory method is plainly available. *Amici* understand that the Alabama Constitution prevents the State from imposing an apportioned tax on the domestic corporations based on their capital employed in the state. Ala. Const. of 1901 art. XII, § 229. But this constraint in the Alabama Constitution can hardly justify a taxing scheme that violates the Commerce Clause of the United States Constitution.

3. Alabama also relies inappropriately on *Reynolds* in claiming that, even if its franchise tax on foreign corporations is unconstitutional, any relief should be prospective for all taxpayers and that none of its unconstitutional tax collections need be refunded.

Alabama's arguments to the Alabama Supreme Court for prospectivity are more of the same — reliance on *Reynolds* and a complete disregard of this Court's precedents. Alabama ignores this Court's clear precedent regarding a State's obligation to provide "meaningful backward-looking relief." *See Newsweek v. Florida Dep't of Revenue*, 118 S. Ct. 804 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *James Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

Despite all of this precedent of this Court, the State argued below to the Alabama Supreme Court that:

> [T]he Alabama Court of Civil Appeals in *White v. Reynolds Metals Company*, 558 So. 2d 367 (Ala. Civ. App. 1989), ruled that its decision that the Alabama franchise tax scheme unconstitutionally discriminates against foreign corporations would be given prospective application. The ruling regarding the prospective application . . . has never been reversed. Consequently, should this Court decide on the merits of the case adversely to the Department, it should give deference to the Court of Civil Appeals' ruling under the doctrine of *stare decisis* in deciding whether to grant prospective application.

DOR Brief, p. 45.

Apparently, Alabama recognizes the doctrine of *stare decisis*; it is just confused as to which court's precedent it should follow.[9] The important point here is that such arguments further confirm the need for this Court to grant *certiorari*. Otherwise, it is apparent that Alabama will continue disregarding this Court's precedent.

CONCLUSION

This Court's denial of *certiorari* in *Reynolds* has emboldened Alabama to disregard decisions of this Court in an effort to collect its unconstitutional tax for as long as possible. Such a strategy is a serious challenge to this Court's Commerce Clause jurisprudence. Accordingly, *amici* urge this Court to grant *certiorari* in this case in order to protect the integrity of this Court's decisions and make it plain that such a strategy must ultimately be unavailing. In addition, given the clear precedent of this Court, *amici* also suggest that it would be appropriate for this Court to summarily reverse without plenary review.

Respectfully submitted,

WILLIAM L. GOLDMAN
Counsel of Record
CARL R. ERDMANN
McDERMOTT, WILL & EMERY
Attorneys for Amici Curiae
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

July 20, 1998

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9. Not only is Alabama arguing for denial of taxpayers' right to substantial backward-looking relief, Alabama also has foiled taxpayers' attempts to avail themselves of a predeprivation remedy by withholding payment of franchise tax and placing bonds in escrow with the Alabama courts. *See Monroe v. Gladwin Corp.*, Ala. S. Ct. No. 1961871, Petition For Extraordinary Writ (Jan. 30, 1998), *reprinted in State Tax Notes*, 97 STN 174-1 (Sept. 9, 1997).

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No. 97-2045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,
v.
STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee On State Taxation ("COST") respectfully requests leave to file a Brief as *Amicus Curiae* in support of Petitioners. The interest of COST as *amicus curiae* is described *infra* at Brief, pp. 1. Counsel for Petitioners has consented to COST's filing of an *amicus* brief. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondents has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this request.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning the constitutional implications of the continued enforcement of the discriminatory Alabama franchise tax. A full exposition of the controversy of this case by interested and

eligible *amicus* is ultimately to the benefit of the Court in its administration of writs for certiorari.

Second, most COST members routinely use the abeyance procedure that is put at risk by the Alabama Supreme Court's decision. This practice is common throughout the state tax system and COST and its members are uniquely familiar with the potential effect of the Alabama Supreme Court's decision on state tax litigation everywhere.

Respectfully submitted,

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

July 20, 1998

* Counsel of Record

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On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the Petitioners in the above captioned matter.*

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is submitting this brief because its members have expressed significant concern over the procedural ramifications to state tax appeals if the Alabama Supreme Court's and

* No Counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners have consented to the filing of this brief and their letters have been filed with the Clerk of this Court. Respondents have denied consent.

Circuit Court's decisions are embraced. COST's membership consists of over 500 multistate corporations involved in interstate and international commerce. COST is a nonprofit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of multi-jurisdictional business entities. In the last five years, COST has filed at least ten briefs with this Court expressing its concern over other discriminatory and unconstitutional state tax systems.[1] Many of COST's members are engaged in business in the State of Alabama and, thus, have a particular interest in the validity of Alabama's franchise tax system. Further, the Alabama courts' expansive application of the doctrine of *res judicata* directly challenges many members' historic approach to the management of tax litigation in Alabama and elsewhere. Finally, all COST members are injured by unconstitutional state burdens on interstate commerce through increased costs and decreased market access.

SUMMARY OF ARGUMENT

In a case in which there are controlling and dispositive United States Supreme Court decisions supporting the Petitioners on all issues raised, the Alabama courts have performed the inconceivable and nevertheless denied relief. The Alabama courts' decisions represent a direct challenge to this Court's authority and should be examined to clearly

[1] *E.g., NACCO Indus., Inc. v. Tracy*, 118 S. Ct. 882 (1998); *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998); *Koch Fuels v. Clark*, 117 S. Ct. 301 (1996); *Thiokol Corp. v. Mich. Revenue Div.*, 117 S. Ct. 2448 (1997); *General Motors Corp. v. Tracy*, 519 U.S. 278 (1996); *GMC v. Kansas City*, 516 U.S. 909 (1995); *ANR Pipeline Co. v. Kan. Director of Property Valuation*, 513 U.S. 917 (1994); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Reich v. Collins*, 513 U.S. 106 (1994); *Geoffrey, Inc. v. S.C. Dep't of Revenue and Taxation*, 510 U.S. 992 (1993).

reaffirm the protections afforded taxpayers under the Commerce and Due Process clauses of the United States Constitution.

In yet another sequel to Alabama's enduring antipathy toward taxpayer rights, the Alabama courts have refused to invalidate Alabama's franchise tax which on its face imposes a different tax system on out-of-state companies than on in-state companies and which in fact imposes a higher incidence of tax on out-of-state companies than on in-state companies. Such decisions are directly at odds with decades of U.S. Supreme Court precedent, including *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), holding that under the Commerce Clause a state may not discriminate in its tax system in favor of local companies over out-of-state companies. Further, the Alabama Supreme Court's affirmance of the Circuit Court's decision that the Petitioners' claims were barred on *res judicata* grounds abrogates the Petitioners' constitutional right under the Due Process Clause to a day in court. The Petitioners were not parties to the case allegedly precluding their claim and had no legal relationship with the parties that were involved in the earlier case. The Alabama courts' decisions blatantly reject *Richards v. Jefferson Cty., Al.*, 517 U.S. 793 (1996), a decision in which this Court only two years ago instructed the Alabama courts that they cannot rely on *res judicata* if the cases at issue did not involve the same taxpayers.

Petitioners, and in fact all taxpayers, have been sorely injured by the Alabama courts' continued disregard of clearly defined constitutional rights to a hearing and freedom from discrimination against interstate commerce. The Alabama courts have effectively notified Petitioners, and everyone else, that taxpayers cannot rely on constitutional protections in the Alabama courts and that Alabama may impose shamelessly unconstitutional taxes without any form of redress to the aggrieved taxpayers. The rule for Alabama as interpreted by the Alabama courts appears to be "Heads I win, tails you lose". This is *not* how the

United States Constitution and legal system were meant to operate and this is therefore not only a worthy case for this Court to consider, but perhaps a necessary case to preserve order and faith in the system.

SUMMARY OF THE TAX

Alabama's corporate franchise tax applies a different tax base and a different tax rate to out-of-state corporations than to in-state corporations. In-state corporations (corporations incorporated in Alabama)[2] are subject to franchise tax solely on the par value of their stock. Ala. Code § 40-14-40 (1993) (the rate is $10 per $1,000). Par value is a figure chosen by the issuer (*i.e.*, taxpayer) and is basically an artificial amount, generally unrelated to either the actual capital of a corporation or the original investment in a corporation. As a result of par value constituting the entire base of the tax for in-state corporations and the value being a number assigned by the taxpayer, in-state corporations have virtually carte-blanche to determine their own Alabama franchise tax burden.

On the other hand, out-of-state corporations (corporations incorporated in states other than Alabama)[3] are taxed on their actual capital employed in Alabama. § 40-14-41(b) (the rate is $3 per $1,000). "Actual capital" includes: (a) outstanding capital stock; (b) surplus and undivided profit; (c) long-term debt; (d) certain related party debt; and (e) accelerated depreciation. *Id.* Inasmuch as the amount of capital a corporation employs in Alabama is dictated by business decisions generally independent of tax decisions, out-of-state corporations are not able to manipulate their franchise tax base in Alabama. The predictable result of such a tax system is that out-of-state corporations typically pay more franchise tax than if they had been incorporated in Alabama.

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[2] Ala. Code § 40-14-40 (1993).

[3] Ala. Code § 40-14-41(a).

ARGUMENT

I. THE ALABAMA FRANCHISE TAX IMPOSES A DIFFERENT AND MORE BURDENSOME FRANCHISE TAX ON OUT-OF-STATE CORPORATIONS COMPARED TO SIMILARLY SITUATED IN-STATE CORPORATIONS IN VIOLATION OF THE COMMERCE CLAUSE.

There can no longer be any genuine argument that the Alabama franchise tax is constitutional under the Commerce Clause. Petitioners have fully explained the reasons that the Alabama franchise tax is unconstitutional and *amicus* will not repeat their arguments here. *See Petitioners' Brief*, pp. 24-28. However, *amicus*, as an organization devoted to the abolition of discriminatory state taxes, will briefly outline what it sees as the bright-line rules this Court has declared establish a non-discriminatory tax and how the Alabama franchise tax has violated those rules.

On its face, the Alabama franchise tax impermissibly discriminates between out-of-state and in-state corporations in violation of the Commerce Clause. A tax is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992). The Alabama franchise tax employs two different tax bases and which tax base a taxpayer is subject to is dependent entirely on which side of the Alabama state line a corporation is incorporated. For taxpayers incorporated in Alabama, the tax base consists of an arbitrary measurement unrelated to actual business activity and controlled and chosen by the taxpayer itself. For taxpayers incorporated outside Alabama, the tax base is computed based on the taxpayer's capital in Alabama which is dictated by business decisions. This statutory distinction creates an incentive for taxpayers to incorporate within Alabama and punishes those taxpayers who incorporate elsewhere. This Court has repeatedly stated

that facial discrimination against interstate commerce is virtually *per se* invalid, *see e.g., Fulton Corp.*, 516 U.S. at 331; *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994), and, as such, the Alabama franchise tax must be unconstitutional.

The Alabama franchise tax also discriminates *in fact* against out-of-state corporations. This Court has a clear substantive rule that "no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Com.*, 429 U.S. 318, 329 (1977) (citations omitted). The record below, as specifically adopted by the Alabama Circuit Court, *see Petitioners' Appendix B*, 21a-22a, proves that the Alabama franchise tax imposes a higher level of taxation on out-of-state corporations than would be imposed on such corporations if they were in-state corporations. As in all of the other discrimination cases addressed by this Court, the "obvious effect of the tax is to extend a financial advantage [to the in-state corporations] at the expense of the [out-of-state corporations]." *Id.* at 331. This higher level of taxation directly and negatively affects an out-of-state corporation's profits and pricing.[4] Such blatant discrimination has never been tolerated by this Court and should not now be silently condoned.

Further, it is now clear that Alabama's franchise tax cannot be supported under the compensatory tax doctrine. In *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990), the Alabama Supreme Court previously had a chance to review the Alabama franchise tax and ultimately found the tax constitutional because, among other justifications, any discrimination could be absolved since it compensated for the domestic shares tax paid by in-state corporations. This ruling is no longer valid (if it ever was) because of this Court's subsequent holding in *Fulton Corp. v. Faulkner*, 516 U.S. 325. In *Fulton*, this Court specifically stated that a tax on corporate stock was not the functional equivalent of an income tax on the issuer and, thus, the compensatory tax doctrine did not apply. This Court went on to state that "we doubt that [a showing of the requirements of the compensatory tax doctrine] can ever be made outside the limited confines of sales and use taxes." *Id.* at 344. If such a showing ever could be made, it was not made here as Alabama offered absolutely no proof as to the actual economic equivalency of the foreign franchise tax and the domestic shares tax.[5] Thus, even the holding in *Reynolds* on which the Alabama Supreme Court relies to deprive the Petitioners relief is unquestionably unsound.

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[4] COST's members have repeatedly expressed disbelief that a tax which so blatantly puts out-of-state corporations at a competitive disadvantage by increasing their cost vis-à-vis in-state corporations is still being enforced. The foundation for the Commerce Clause has always been to foster an open market between the states. Such a market can only exist through free and unburdened competition. This Court has consistently recognized the importance of competition to our national economy and the contributions of the Commerce Clause to the cultivation of competition. *See H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality"). To the extent that a company incorporated outside of Alabama pays more in tax than a company incorporated within Alabama, competition is diminished and another step is taken toward state economic balkanization.

[5] See *Petitioners' Brief* at pp. 26-28 for an application of the three requirements for a compensatory tax under *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 103 (1994).

In sum, the Alabama franchise tax is unconstitutional under the Commerce Clause because it imposes, both on its face and in fact, a greater burden on out-of-state corporations than on in-state corporations with no equivalent in-state tax to compensate for this burden. The tax is a classic example of a discriminatory tax and is therefore abhorred by this Court's constitutional jurisprudence.

II. ALABAMA HAS DENIED THE PETITIONERS ACCESS TO ITS COURTS UNDER THE DOCTRINE OF *RES JUDICATA* DIRECTLY IN CONTRAVENTION OF THE U.S. SUPREME COURT'S 1996 RULING THAT THIS INTERPRETATION OF *RES JUDICATA* VIOLATES THE DUE PROCESS CLAUSE.

The Petitioners were apparently unable to invalidate the Alabama franchise tax, not because they failed to prove discrimination, but because the Alabama courts found that under the doctrine of *res judicata* a decision in an earlier case involving a different taxpayer precluded a decision on the merits in Petitioners' case. *Amicus* fears that the practice followed by the Petitioners of holding their case in abeyance pending the resolution of a lead case, which is standard practice in the state tax controversy area, led to the *res judicata* ruling. Such a ruling directly, unnecessarily, and unconstitutionally threatens the continued use of this practical procedure.

The procedural issue that *amicus* is concerned about arose because one of the Petitioners asked to hold its case in abeyance until a case that was ahead of it procedurally, *White v. Reynolds Metals Co.*, 558 So. 2d 373, was finally determined. The affected Petitioners agreed to this procedure because there was a possibility that the *Reynolds* case would resolve the constitutionality of the Alabama franchise tax and make further taxpayer litigation unnecessary. This procedure saved money and time for both the Petitioners and the Alabama Department of Revenue. Ultimately, the Alabama Supreme Court determined in *Reynolds* that the Alabama franchise tax was constitutional and, thus, ruled against the taxpayers. This Court denied *certiorari* in *Reynolds*, 496 U.S. 912 (1990), and the Alabama Supreme Court decision became the final adjudication of that case.

Following the final determination of the *Reynolds* case, several distinguishing events occurred that differentiated the Petitioners' case from *Reynolds*. First, the Petitioners completed an extensive statistical study that proved that out-of-state corporations in fact paid more franchise tax than in-state corporations. This study and its conclusion were adopted as a finding of fact by the Alabama Circuit Court; thus, its validity is no longer in question. *See Petitioners' Appendix B*, 21a-22a. Such a study had not been undertaken by the taxpayers in *Reynolds*. Second, this Court decided several pivotal Commerce Clause cases, including *Fulton*, emphasizing that no discrimination was tolerable under the Commerce Clause and that the compensatory tax doctrine was to be narrowly applied. Notwithstanding the lack of connection between the Petitioners and the taxpayers in *Reynolds*, the Alabama courts have nevertheless refused to invalidate the tax based on the merits because the courts found that as a result of *Reynolds*, Petitioners' claims were precluded under the doctrine of *res judicata*.

Amicus is concerned that the procedure of holding a case in abeyance while another case finishes the appellate process was the reason that the Petitioners were found to be barred by *res judicata*. One judge in the majority specifically characterized this procedure as the basis for his decision. *Opinion of Justice Maddox* (concurring specially). Holding a case in abeyance pending a decision in a lead case is a common practice utilized by taxpayers and taxing authorities alike to preserve resources and allow for the orderly administration of taxes. Typically, a taxpayer whose case is being held in abeyance does not participate in any way with the lead case. In most circumstances, the lead case is adequately presented and the

decision in that case resolves all issues for the remaining taxpayers. In these cases, the losing parties will usually withdraw the remaining claims. However, in some cases, as represented here, factual or legal distinctions are raised that differentiate a pending case from the lead case. When this happens, taxpayers expect to and in fact have been able to proceed with their own case. Inasmuch as parties to cases procedurally behind a lead case do not know until the lead case has been finally determined whether further litigation will be needed, such parties do not have sufficient information at the beginning of their case to choose whether to be bound by the lead case or to proceed independently with their own. The system of holding a case in abeyance without forfeiting the right to pursue one's own case strikes the appropriate balance between judicial economy and the preservation of the right to a hearing. The Alabama courts' decisions have disrupted this balance.

The ability to hold a case in abeyance without forfeiting the right to pursue the case in court is necessary for the rational operation of the courts. Frequently, when a tax is challenged as invalid, a significant number of taxpayers will file refund claims to protect their interest in the event that the tax is struck down. At the same time, the taxing authority will continue to assert the validity of the tax and issue assessments against those taxpayers who do not comply. Such claims and assesments must be filed before the conclusion of the lead case because the statute of limitations on the refunds and assessments would otherwise expire.[6] If the taxing authority is required to litigate each of these claims in full while waiting for the lead case to be decided, then the tax authority will be quickly over-

[6] The need for taxpayers to file a protective refund claim before challenges to the tax have reached fruition has recently been exacerbated by the trend among the states to impose very short statute of limitations on such claims. *See, e.g.*, Mich. Comp. Laws § 205.27a(6) (1997) (90 days); N.C. Gen. Stat. § 105-267 (1997) (30 days).

whelmed by the volume of cases involving one, isolated issue. Even if only a few cases are pursued, this will lead to an increased burden on strained government staffs. The administrative and judicial tribunals responsible for hearing the refund cases and appeals will similarly be overwhelmed with a burdensome case load. Finally, it is a financial drain on both taxpayers and the tax authority to litigate each case rather than waiting for the ultimate outcome of one lead case.

It is *amicus's* experience that absent intervention by this Court, Alabama's interpretation of *res judicata* will be adopted by other states and taxpayers will be forced to protect their interests in all jurisdictions, not just in Alabama. If an interpretation that a taxpayer has agreed to be bound by a prior taxpayer's case by merely agreeing to hold a case in abeyance, regardless of the facts in that case or intervening contrary decisions, is not explicitly invalidated, taxpayers will pursue their cases rather than hold them even though to do so may be a repetitive exercise resulting in a waste of taxpayers' and government's time.

As a result of the Alabama courts' decisions below, judicial and economical savings through the abeyance procedure will be unavailable to the sensible taxpayer. No informed taxpayer will agree to hold a case in abeyance knowing that such a move may effectively foreclose the opportunity to litigate one's own facts, under one's own legal theories, with one's chosen legal counsel. Thus, from a practical standpoint, the anticipated effect of the Alabama courts' decisions is patently unworkable and could lead to disruption in the tax judicial system.

From a legal perspective, the Alabama courts have confused the doctrine of *res judicata* with the concept of precedent and *stare decisis*. The *Reynolds* case did precede the Petitioners' case and in the absence of distinguishing precedent or facts could have been a legal basis for a ruling against the Petitioners on the merits. The Alabama courts have prevented the Petitioners from receiving a rul-

ing on the merits on the theory that Petitioners' claims are actually precluded by *Reynolds*. Neither claim nor issue preclusion can possibly apply as between *Reynolds* and the Petitioners' case because the cases involved different taxpayers, different tax years, different facts, different proof, and new controlling precedent. Such a use of *res judicata* is not only inappropriate, it is also specifically prohibited by the Due Process Clause of the Fourteenth Amendment and by the prior decisions of this Court.

This is not the first time that Alabama has attempted to use *res judicata* to deprive taxpayers of their right to protest a tax. It is also not the first time that this Court has been asked to consider Alabama's application of *res judicata*. In *Richards v. Jefferson Cty., Al.*, 517 U.S. at 802, a case also involving Alabama taxpayers and the Alabama courts, this Court held that unrelated parties were not bound by *res judicata* principles. Notwithstanding the clear mandate in *Richards*,' the Alabama courts have failed to note any of the traditional elements of *res judicata* that this Court has accepted as fulfilling due process requirements. The Petitioners were not parties in the *Reynolds* case, had no privity with the parties in the *Reynolds* case, and did not have any special relationship with the parties in the *Reynolds* case. The taxpayers in the *Reynolds* case were not representatives of a class covering the Petitioners nor was there any special judicial procedure, such as bankruptcy, that would require the Petitioners to be bound by the judgment in *Reynolds*. The taxpayers in *Reynolds* did not consult with Petitioners regarding the case or seek in any way to determine and protect the Petitioners' interests. As such, the Alabama courts have violated the Petitioners' due process rights by binding the Petitioners to a case in which they had no legal connection.

If the Petitioners cannot challenge the Alabama tax because of *res judicata* there appears to be no party that could challenge and invalidate the illegal tax. The result is that an obviously unconstitutional tax not only remains

on the books, but continues to be enforced against all Alabama taxpayers. Currently there are numerous other taxpayers whose court cases have been put on hold until a final decision is reached in Petitioners' case. Based on the Alabama courts' reasoning, these taxpayers would be similarly precluded from pursuing their rights if the Petitioners are foreclosed from the challenge. There are also dozens of refund claims pending at the administrative level. Are each of these claims precluded under *res judicata* principles because of the *Reynolds* (and now *South Central Bell*) case? At exactly what point will a taxpayer once again be able to challenge the tax? Two years; three years; ten years from now? And, in the interim, Alabama will continue to impose and enforce its unconstitutional tax.

The importance of this case is not isolated to Alabama's apparently aberrational interpretation of *res judicata*. First, Alabama has done this before and been overruled by this Court. *Richards v. Jefferson Cty., Al.*, 517 U.S. 793. Second, the Alabama courts' decisions are merely one example of the repeated efforts of states to discover theories by which they can overcome responsibility for blatantly discriminatory state tax schemes. States have attempted to argue that even if a tax is unconstitutional, such a finding can be applied prospectively only, effectively denying relief to those challenging the tax. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). States have also argued that they need not offer refunds even if the only procedure for challenging a tax was to first pay the tax and then file a refund action in the state's courts. *See Newsweek Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998). This Court has repeatedly ruled against these evasive actions, although it has sometimes taken several decisions for the rule to have an effect on some state tax administrators. In each of these cases, like the case at bar, the taxes were clearly unconstitutional but the states fought to the bitter end to preserve the illegally collected revenue using procedural hurdles that have been invali-

dated by this Court. The *res judicata* theory is but another flimsy barrier erected by the states that should be discarded.

Amicus believes that it is time for this Court to send a final and unequivocal statement to the states that discriminatory taxes are intolerable and that taxpayers are entitled to relief from such taxes.[7] While this Court's prior decisions seem clear, Alabama and other similar states apparently need to be told the rules once more. In the end, and at the risk of sounding too melodramatic, this Court must maintain its vigilance in the face of repeated efforts by the states to circumvent taxpayers' constitutionally guaranteed rights. If the states do not comply and this Court does not force compliance, such rights become merely meaningless words on a piece of paper.

CONCLUSION

The Alabama courts seem oddly tone-deaf to the clear constitutional rules as set down by this Court. The persistent recalcitrance of the Alabama courts and legislature to respect the U.S. Constitution and its interpretation by this Court is the backbone of *amicus's* interest in the case. The basis for Petitioners' request for review and *amicus's* interest is *not* merely a perception that the Alabama courts made a mistake. Rather, it is a result of a repeated frustration of businesses operating within Alabama toward the cavalier and down-right hostile attitude that Alabama displays toward constitutional protections. This Court should accept this case in order to reinforce its supreme place in the land and its prior precedents in both the Commerce Clause and Due Process area.

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[7] Such a message is particularly important in the state tax area because pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers must bring challenges to state taxes in the state courts and do not have access to the lower federal courts.

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Alabama Supreme Court.

Respectfully submitted,

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

July 20, 1998

* Counsel of Record

(7)

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IN THE
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OCTOBER TERM, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA and
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

TIMOTHY J. MCCORMALLY
Counsel of Record
MARY L. FAHEY
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W.
Suite 300
Washington, D.C. 20005-3814
(202) 638-5601
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of petitioners.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute")

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[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of the Petitioners and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent nearly 2,800 of the leading busineses in the United States and Canada, nearly all of which are engaged in interstate commerce.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the due process and Commerce Clause rights of business taxpayers.

Tax Executives Institute's members have a vital interest in the resolution of this case, which involves the State of Alabama's franchise tax. Even those members whose companies are not doing business in Alabama are, almost without exception, engaged in interstate commerce. Consequently, they benefit from, and are entitled to, the protection afforded by the Commerce Clause and Due Process Clause of the U.S. Constitution. The potential diminution of that protection portended by the Alabama Supreme Court's decision is of material concern to the Institute and all its members. Because TEI members and the businesses by which they are employed will be materially affected by the Court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

This case involves the questions whether Alabama's theory of *res judicata* operates to deny taxpayers due process and, further, whether the State's franchise tax on out-of-state corporations contravenes the Commerce Clause of the Constitution. U.S. CONST. amend. XIV,

§ 1; U.S. CONST. art. I, § 8, cl. 3. The record shows that, by improperly invoking *res judicata*, the Alabama courts unconstitutionally denied the taxpayers their due process rights. It also shows that the State of Alabama has been discriminating against foreign corporations for more than eight decades.

The Alabama trial court's theory of *res judicata* squarely contradicts the Court's 1996 decision in *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996). There, the Court held that the State's interpretation of *res judicata* "deprived [the taxpayers] of the due process of law guaranteed by the Fourteenth Amendment." *Id.* at 1765. In this case, the trial court perpetuated the Alabama Supreme Court's error in *Richards*. Under the trial court's rationale, businesses would be forced to follow hundreds, if not thousands, of state tax cases—assuming, that is, that an adequate, time-sensitive tracking system even existed. Equally troubling, the result below implies that taxpayers may have to intervene in any case that *might* tangentially affect their interests in order to preserve their rights. As an organization dedicated to minimizing the costs and burdens of tax administration, *amicus* TEI is troubled that such a suggestion might be taken seriously. The courts, too, should be concerned about the deluge of protective interventions that would assuredly thwart the goal of judicial economy. Finally, *amicus* TEI is concerned about the imposition of a more stringent standard for "large and sophisticated" taxpayers that employ "well known" counsel and the strain that application of such a standard would impose on both courts and taxpayers.

The doctrine of *res judicata* is intended to promote finality and judicial economy by precluding the relitigation of issues where the parties in interest had previously enjoyed "their day in court." As the Court explained in *Richards*, "to contend that the plaintiffs in [the prior litigation] somehow represented petitioners, let alone represented them in a constitutionally adequate manner,

would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" 116 S. Ct. at 1768 (quoting *Hansberry v. Lee*, 311 U.S. 32, 46 (1940)). Furthermore, the doctrine does not apply when superseding decisions of this country's highest court have repudiated the basis for the original decision. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (federal tax case). The decision below represents an extreme application of *res judicata* in violation of the Due Process Clause and should be reversed.

Moreover, the decision below also contravenes the Commerce Clause of the Constitution. The "fundamental purpose of the Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign, or out-of-state, corporations than on domestic corporations engaged in comparable activity. *Id.* at 329. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence of either a discriminatory purpose or a discriminatory effect compels a finding of proscribed "economic protectionism." *Id.* at 272-73.

In contrast to Alabama's domestic franchise tax (which is based on the par value of the corporation's outstanding stock), the State's foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. As a result of the different tax bases, foreign corporations doing business in Alabama are subject to a much higher level of taxation than are similarly situated domestic corporations. For domestic corporations, payment of more than a nominal amount of franchise tax is effectively optional, whereas foreign corporations do not enjoy such a choice. That difference cannot withstand scrutiny.

Alabama's discrimination against out-of-state taxpayers is indisputable. Indeed, not one Alabama judge who reviewed the evidence in this case held that the State's franchise tax scheme is constitutional. That the tax does not pass constitutional muster was made manifest by this Court's decision three terms ago in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), in which a North Carolina intangibles tax on the fair market value of stock owned by state residents was examined. Under the state statute, residents owning stock in a corporation that earned income solely within the state paid no intangibles tax, whereas residents with stock of foreign corporations having no in-state activities paid the full amount. Because the tax was computed on a different net base depending on the corporation's in-state activities, it facially discriminated against interstate commerce. 516 U.S. at 327-28, 333 & n.3.

In light of the *Fulton Corp.* case, the Alabama Supreme Court did not hold that the tax is not discriminatory. Rather, the state supreme court simply affirmed a decision where the trial court conceded the tax's discriminatory nature but denied taxpayers' constitutional right to contest it on grounds of *res judicata*—specifically, the Alabama Supreme Court's prior decision in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). Subsequent decisions of this Court demonstrate unequivocally, however, that the Alabama Supreme Court's 1989 decision in *Reynolds Metals* was wrong. *See Fulton Corp.*, 516 U.S. at 333 (1996 decision holding North Carolina's tax on stock is unconstitutional); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 104 (1994) (1994 decision holding that the failure to identify a specific charge on intrastate commerce equal to or exceeding charge on interstate commerce is fatal to state's claim). What is now clear—if there was ever any doubt—is that the Commerce Clause proscribes any and all discrimination, regardless of intent.

Faced with the choice of crafting a meaningful remedy that would be neither easy to implement nor inexpensive or of conjuring up a justification for denying the teachings of both *Fulton Corp.* and *Richards*, the Alabama court embraced the latter course. Viewed in isolation, the decision is troubling for it suggests a willingness to vitiate the constitutional rights of interstate businesses in order to preserve a discriminatory taxing scheme. Viewed more broadly, this case represents just another step in States' sorry efforts to avoid paying taxpayers what they are rightly owed—the refund of an unconstitutional tax.

In this case, Alabama distended *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama prevails here, state courts will become a place where the rules no longer matter. If taxpayers win by the rules, too many States may consider themselves free to change them. Such a result cannot be permitted. The decision below should be reversed.

ARGUMENT

I.

The questions presented here are (1) whether the State of Alabama's interpretation of the doctrine of *res judicata* operates to deny the taxpayers due process and (2) whether the State's franchise tax on out-of-state corporations contravenes the Commerce Clause of the Constitution. U.S. CONST. amend. XIV, § 1; U.S. CONST. art. I, § 8, cl. 3. The overarching issue, however, is much more straightforward: Whether the States should be permitted to erect one legal artifice after another to deny taxpayers their constitutional rights and extract from them impermissible taxes. The record shows that the State's courts have engaged in adjudicatory sleight of hand to prevent taxpayers from litigating the constitutionality of the taxing scheme and hence to shield Alabama's violation of the Commerce Clause from review and correction.

Their efforts, which come on the heels of corresponding efforts by other States concerning other taxes, constitute a violation of the Fourteenth Amendment's Due Process Clause and must fail.

Foreign corporations doing business within the State of Alabama are subject to a franchise tax based on "the actual amount of . . . capital employed" in the State. ALA. CODE § 40-14-41(a) (1993) (App. G at 91a);[2] *see* ALA. CONST. art. XII, § 232 (1901). The Alabama Code defines "capital" to include not only the par value (or stated value) of the foreign corporation's outstanding capital stock, but also its surplus and undivided profits, long-term debt, certain related-party debt, and accelerated depreciation. ALA. CODE § 40-14-41(b) (1993) (App. G at 91a-92a). Capital employed in Alabama is determined by apportioning total capital to Alabama on the basis of a three-factor formula (property, payroll, and sales). ALA. ADMIN. CODE r. 810-2-3-.11 (1991) (App. G at 106a).

Domestic corporations are also subject to an annual franchise tax for the privilege of corporate existence within Alabama, but the base upon which the domestic tax is computed differs materially from the foreign franchise tax base. Specifically, the domestic tax is imposed solely on the amount of the domestic corporation's "capital stock," which means the aggregate par value of the domestic corporation's outstanding stock. ALA. CODE § 40-14-40 (1993) (App. G at 90a); *see* ALA. CONST. art. XII, § 229 (1901); *White v. Reynolds Metals Co.*, 558 So.2d 373, 374 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). Because the Alabama Code permits do-

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[2] "App." references are to the various appendices bound with the Petitioners' Petition for a Writ of Certiorari to the Supreme Court of Alabama in *South Central Bell Telephone Co., et al. v. State of Alabama and State Department of Revenue*, No. 97-2045 (filed June 18, 1998).

mestic corporations to issue stock of low or no par value, those corporations may reduce their franchise tax liability to as little as $50 without changing their size, total capitalization, or the extent of their business activity within or without Alabama—any of which would affect an out-of-state corporation's tax liability. *See* ALA. CODE § 40-14-40 (1993) (App. G at 90a) (domestic franchise tax shall be no less than $50); Stip. Facts ¶¶ 21-23 (App. D at 52a-53a) (corporation may control amount of domestic franchise tax by assigning any value to par value or stated value of its capital stock).

Thus, whereas the domestic franchise tax is based on the par value of the corporation's outstanding stock (which may be legally manipulated by a domestic taxpayer), the foreign tax base includes not only that value, but also several items that are independently fixed—surplus, retained earnings, long-term and related-party debt, and accelerated depreciation.

As a result of the different tax bases, foreign corporations doing business in Alabama are subject to a substantially higher level of taxation than are similarly situated domestic corporations.[3] The trial court below accepted taxpayers' documentation that the Alabama franchise tax statutes in fact discriminate in favor of domestic corporations. (App. B at 21a n.7 & App. C at 34a-38a.) The study introduced by taxpayers determined that if domestic corporations had been subject to the franchise tax imposed on foreign corporations, the liability of the domestic entities would have been five times higher than it actually was. (App. C at 36a.) For example, the average percentage of discrimination in 1988 was 409.56 percent and in 1991, 509.15 percent. *Id.*

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[3] The domestic tax rate is $10 per $1,000 of capital stock while the foreign tax rate is $3 per $1,000 of capital employed, but the differential does not compensate for the vastly different tax bases.

The magnitude and consequence of Alabama's discrimination here are indisputable. Indeed, not one Alabama judge who reviewed the evidence in this case even intimated that the State's franchise tax scheme is constitutional. As the trial court conceded:

> [T]he Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation. Accordingly, the Court finds that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution.

(App. B at 21a-22a) (footnote omitted). In spite of this finding of unconstitutionality, the trial court barred taxpayers from litigating the issue by virtue of its interpretation of *res judicata*. (App. B at 17a-19a, 22a.) A divided Alabama Supreme Court affirmed the decision without opinion. (App. A at 1a.)

II.

In this case, the trial court ruled that the taxpayers were precluded from litigating the constitutionality of the franchise tax because of the Alabama Supreme Court's prior decison in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). In reaching its conclusion that this action is barred by *res judicata*, the trial court below seriously misapprehended this Court's decision in *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996). In doing so, it denied the taxpayers their federal due process rights. U.S. CONST. amend. XIV, § 1.

In considering the Alabama court's theory of *res judicata* here, the Court will no doubt experience an uncanny sense of *déjà vu*. In *Richards*, the taxpayers challenged the constitutionality of a county occupation tax on both state and federal grounds. The county

moved for summary judgment on the grounds that the taxpayers' claims were barred by a prior adjudication of the tax by a city director of finance. The trial court granted the county's motion on the state constitutional claims, but refused to do so on the federal claims, which had not been considered in the earlier case. On appeal, Alabama's highest court held that the federal claims were also barred.[4]

In its opinion in *Richards*, this Court unanimously found that Alabama's interpretation of *res judicata* "deprived [the taxpayers] of the due process of law guaranteed by the Fourteenth Amendment." 116 S. Ct. at 1765. In explaining this conclusion, the Court invoked the traditional rule that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* (citation omitted).

Confirming that the "opportunity to be heard is an essential requisite of due process of law in judicial proceedings," the Court dismissed the Alabama court's conclusion that *res judicata* applied because the parties were adequately represented in the prior suit. 116 S. Ct. at 1765 n.4 & 1767. To have a binding effect on absent parties, the Court stated, a prior proceeding must at least be—

> so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

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[4] The court reasoned that (i) the complaint in the earlier case had alleged that the county tax violated the Equal Protection Clause of the U.S. Constitution and an equal protection argument had been made in the briefs; (ii) the taxpayers in the prior case adequately represented petitioners because their respective interests were "essentially identical"; and (iii) the county had relied on the prior case in pledging tax revenues and issuing bonds. *Richards v. Jefferson Cty.*, 662 So.2d 1127, 1130 (Ala. 1995), *rev'd*, 116 S. Ct. 1761 (1996).

Id. at 1767 (quoting *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)). This requirement was absent in *Richards* for three reasons. First, the taxpayers did not sue on behalf of a class. Second, they did not assert any claim against or on behalf of a class or nonparties. And third, the judgment they received did not purport to bind taxpayers who were not parties to the litigation. 116 S. Ct. at 1767.

In this case, the trial court perpetuated Alabama's error in *Richards*. Specifically, the court misconstrued *Richards* as holding the application of *res judicata* improper only because the petitioners did not receive notice of the prior litigation and were not sufficiently represented in that case. (App. B at 18a.) The trial court averred that the taxpayers here are "large and sophisticated" corporations "well informed in all matters involving issues of national and state taxation and . . . well informed of significant pending legal actions and court decisons." *Id.* Because the taxpayers were aware of the *Reynolds Metals* case at the time it was being litigated and because the taxpayers in that prior case were represented by "well known and excellent counsel"—and, indeed, were represented by the same counsel—the court endeavored to lower the bar of *res judicata*, insisting its action did not violate the taxpayers' due process rights. (App. B at 19a.)

Although facile and somewhat beguiling, the trial court's decision does not withstand scrutiny. Not only did the court exaggerate the extent and significance of the overlap of counsel in *Reynolds Metals* and the instant case, but its reasoning is strained.

First, although it is true that one of the petitioners' counsel represented the taxpayers in the *Reynolds Metals* case, the attorney's involvement in the earlier case was limited to seeking a writ of certiorari in this Court. In other words, he did not represent the taxpayers before the Alabama courts. More fundamentally, the Alabama trial court here misunderstands the core purpose of *res judi-*

cata. The doctrine is intended to promote finality and judicial economy by precluding the relitigation of issues where the parties in interest had previously enjoyed "their day in court." *See Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (federal tax case). Even assuming the taxpayers here had knowledge of the *Reynolds Metals* case (and the record confirms that they did not become aware of the earlier case until after the trial court's decision [5]), the court's assumption that interstate businesses can and should keep track of all cases *potentially* affecting them is at once preposterous and perverse. Under the court's rationale, corporate taxpayers would be forced to follow hundreds, if not thousands, of state tax cases to which they were not parties. The decision would require an adequate, cost-effective, and time-sensitive tracking system—which, in fact, does not exist. Indeed, in many jurisdictions, trial court jurisprudence is not even published, and the only way a taxpayer could know about such cases would be to travel perpetually from courthouse to courthouse, reviewing every complaint and other pleading lodged in a case. Even for published decisions, taxpayers would need actual notice of every case. It is hard to believe such a clog in interstate commerce is constitutionally acceptable. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Even more troubling, the Alabama decision implies that taxpayers should stand ready to intervene in any case tangentially affecting their interests in order to preserve their rights. As an organization dedicated to minimizing the costs and burdens of tax administration to the common benefit of government and taxpayers, *amicus* TEI is astonished that such an impractical suggestion might be seriously made. The courts, too, should be concerned about the flood of protective interventions that would severely bog down the civil trial process. In other words, rather than serving the goal of judicial economy, the lower court's application of *res judicata* would thwart it.

[5] App. F. at 69a-70a, 73a-74a.

Moreover, *amicus* TEI is concerned about the practical effect of the trial court's imposing a more stringent standard on "large and sophisticated" taxpayers who employ "well known" counsel. Will large corporations be forced to plead unsophistication about tax matters in order to safeguard their right to dispute unconstitutional taxes? That their advisers are not well known? Will all large corporations be assumed in privity with one another and to share the same concerns, even though circumstance shows that often not to be the case? Will small, but sophisticated corporations be subject to the same standard? *Amicus* TEI submits that the size and sophistication of corporate taxpayers, as well as employment of experienced counsel, should be wholly irrelevant to the assertion—and vindication—of constitutional rights against discriminatory taxation.[6]

Without a doubt, a central principle of Anglo-American jurisprudence is that "one is not bound by a judgment *in personem* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry*, 311 U.S. at 40. This rule, which is part of our "deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE ¶ 4449, at 417 (1981)), is threatened by the decision below. Indeed, that decision mocks the rule that a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers. 490 U.S. at 762.[7]

[6] Alabama's own case law holds that the doctrine of *res judicata* should be used sparingly to preclude judicial review in tax cases involving different years. *Alabama v. Plantation Pipe Line Co.*, 89 So.2d 549, 569 (Ala.), *cert. denied*, 352 U.S. 943 (1956). This is particularly true for cases involving different tax years *and* different taxpayers. *See Richards*, 116 S. Ct. at 1768.

[7] The State's reliance (Br. in Op. at 6) on a footnote in *Martin v. Wilks*, asserting that there are exceptions to this general rule,

As the Court explained in *Richards*, "to contend that the plaintiff in [the prior litigation] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" 116 S. Ct. at 1768 (quoting *Hansberry*, 311 U.S. at 46). The doctrine simply does not apply when superseding decisions of this country's highest court have repudiated the basis for the original decision. *Sunnen*, 333 U.S. at 599 (*res judicata* or estoppel by judgment "is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers"). The decision below represents another extreme application of *res judicata* in violation of the Due Process Clause. It should be reversed.

III.

The Commerce Clause of the Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3. The clause not only provides Congress with broad regulatory powers, but also embodies a negative command forbidding States from discriminating against interstate

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is misplaced. *See* 490 U.S. at 762 n.2. In that case the Court identified three situations in which nonparties may be bound. First, the Court named class actions as being capable of binding "strangers" to litigation. The petitioners' challenge to the Alabama franchise tax is not such an action. *See Richards*, 116 S. Ct. at 1768. The second class of cases identified involved the control of litigation in behalf of one of the parties to the litigation. There is no such control here. Mere knowledge of the claim—if it existed here—is surely insufficient. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (judgment against parent corporation of a party properly vacated because it was not named as a party or served, even though it clearly knew of the claim and had made a special appearance to contest jurisdiction). Finally, the Court in *Martin v. Wilks* said nonparties might be bound where there is a special remedial scheme, as in bankruptcy or probate cases. That, however, is not the case here. 490 U.S. at 762 n.2.

commerce. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98 (1994). Its fundamental purpose "is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign corporations than on domestic corporations engaged in comparable activity. *Id.* at 329 ("[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects" [citations omitted]); *see Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72-74 (1963). Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence of either a discriminatory purpose or a discriminatory effect justifies a finding of proscribed "economic protectionism." *Id.* at 272-73. Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Oregon Waste Systems*, 511 U.S. at 101.

In *Reynolds Metals*, the Alabama Supreme Court opined that the State's franchise tax scheme did not violate the Commerce Clause. In rationalizing its conclusion, the court cited several reasons for imposing foreign and domestic franchise taxes on different bases:

> ease of regulation and enforcement, differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations.

558 So.2d at 389. The court in *Reynolds Metals* also blithely cited statements by the Chief of the Franchise Tax Division of the Alabama Department of Revenue that foreign corporations could reduce the amount of their franchise tax liability "merely by forming domestic corporate subsidiaries to do business in this state or by be-

coming Alabama corporations themselves." *Id.* at 384. To suggest such a burdensome course of action, however, is to miss the point of the Commerce Clause: Taxpayers should not be forced to jump through the hoop of domesticating their business activities or establishing subsidiaries in every State in order to avoid discrimination.[8] *See Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance*, 505 U.S. 71, 78 (1992).

Indeed, that Alabama's franchise tax does not pass constitutional muster was made manifest by this Court's decision three terms ago in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), in which a North Carolina intangibles tax on the fair market value of stock owned by state residents was scrutinized and found wanting. Although the tax was assessed at a stated rate, residents could calculate their tax liability by taking a deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina. Thus, whereas taxpayers owning stock in a corporation that earned income solely within the state paid no intangibles tax, taxpayers with stock of foreign corporations having no in-state activities paid the full amount. Because the tax was computed on a different net base depending on the corporation's in-state activities, it facially discriminated against interstate commerce. 516 U.S. at 327-28, 333 & n.3. The same facial discrimination against interstate commerce marks the Alabama franchise tax. (App. A at 12a.)[9]

[8] Indeed, even assuming that it would be constitutionally permissible to require taxpayers to establish a separate subsidiary in every State, that option might not be available to some businesses. For example, a transportation company whose assets and employees move across state lines would find it impossible to operate in interstate commerce through a series of domesticated subsidiaries.

[9] Even before *Fulton Corp.*, the Alabama state court's rationale was suspect. In *Reynolds Metal*, the Alabama court erroneously equated the standards under which equal protection and Commerce Clause challenges are to be judged. In point of fact, two very different and distinct standards are to be applied: Whereas a statute may withstand attack on equal protection grounds where a classification is "rationally related to [a legitimate state] purpose," *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985), the Commerce Clause proscribes *all* taxes that discriminate against interstate commerce, without regard to whether they are rationally related to a state purpose, *Maryland v. Louisiana*, 451 U.S. at 760. *See also Halliburton Oil Well Cementing Co.*, 373 U.S. at 73 ("we see no reason to depart from the strict rule of equality"); *Bacchus Imports*, 468 U.S. at 273 ("it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers").

Moreover, the tax cannot stand as a compensatory levy designed simply to make interstate commerce bear a burden already borne by intrastate commerce. Under the compensatory tax doctrine, a facially discriminatory tax that imposes on interstate commerce the equivalent of an "identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause." *Oregon Waste Systems*, 511 U.S. at 103 (internal quotation marks omitted). There are three conditions for finding that a facially discriminatory tax is compensatory. First, a State must identify the intrastate tax burden for which the State is attempting to compensate. Second, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is to say, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Fulton Corp.*, 516 U.S. at 332-33.

Like the intangibles tax in *Fulton Corp.*, the Alabama franchise tax cannot survive under the guise of a compensatory tax. Under the Alabama statutes, domestic corporations pay a 1 percent tax on their capital stock, while foreign corporations pay a 0.3 percent tax on capital employed within the state. ALA. CODE §§ 40-14-40, 40-14-41 (1993) (App. G at 90a-97a). That the State failed to meet its burden of showing that the foreign

franchise tax approximates the domestic tax or is substantially equivalent to other state taxes was confirmed by the well-reasoned dissent below:

> It is not facially apparent that application of the foreign franchise tax rate (0.3%) to the much larger base of par value plus other items such as surplus and long-term debt merely equalizes the burden produced by the application of the domestic franchise tax rate (1%) to the easily manipulable base of par value. . . . [T]he Taxpayers offer substantial evidence supporting the proposition that the foreign franchise tax exceeds any intrastate burden. . . . The State also fails to show that the events taxed by Alabama's intrastate taxes and the interstate tax are "substantially equivalent."

(App. A at 12a-14a) (See, J., dissenting). This finding is not at all surprising since "actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 650 (1994) (citations omitted).

Let there be no mistake: In light of *Fulton Corp.*, the Alabama Supreme Court did not dispute that the Alabama "franchise tax facially discriminates against interstate commerce, and arguments over the degree of discrimination do not affect this characterization." (App. A at 13a) (See, J., dissenting). Rather, that court hid behind a lower court opinion conceding the tax's discriminatory nature but denying taxpayers' constitutional right to contest it on the grounds of *res judicata*. One compelling inference to be drawn from the Alabama Supreme Court's aversion to reaching the merits of the statute is that it recognized the futility of that inquiry under the Commerce Clause. As the Court explained in *Fulton Corp.*, "[s]tate laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" 516 U.S. at 331 (citations omitted). *See also Oregon Waste*

Systems, 511 U.S. at 104 (1994 decision holding that the failure to identify a specific charge on intrastate commerce equal to or exceeding charge on interstate commerce is fatal to State's claim).

What is now clear—if there was ever any doubt—is that the Commerce Clause does not sanction *any* discrimination, regardless of magnitude or intent. As the Court noted in *Maryland v. Louisiana*, 451 U.S. at 760, "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." Alabama's unequal tax at issue here must likewise fall.

IV.

The State of Alabama is in an unenviable position. Having discriminated against interstate commerce for years, the State finds itself confronted with the reality that its franchise tax scheme is unconstitutional, but also unable (or unwilling) to rectify the situation. Faced with the choice of crafting a meaningful remedy or of conjuring up a justification for denying the teachings of both *Fulton Corp.* and *Richards*, the court below disappointingly embraced the latter course. Indeed, the State employed Jabberwockian logic to apply *res judicata* in a manner that makes sense only if you do not think about it. Unfortunately for the State, the difficulty of fashioning an effective remedy—of placing the parties in roughly the same position they would have been in had their constitutional rights not been compromised—is not license to escape a situation of its own making.

The last 15 years have seen the States propound many an original and unfounded argument to deny taxpayers relief. This Court has rightly shown patience in permitting the States time to rectify their mistakes.[10] Some

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[10] *See National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S. Ct. 2351, 2354 (1995) ("principles of federalism

States, however, have taken advantage of the deference accorded them, either by improperly seeking to apply the Court's holdings on a prospective-only basis or by construing the States' refund statutes to render Pyrrhic the taxpayers' constitutional victory.[11] Alabama's strained approach here—donning judicial blinders to deny taxpayers access to a forum to press their righteous claims—represents a new tack, but it too should fail as inconsistent with federal due process principles.

The record in this case establishes that Alabama, while recognizing the dubious vitality of its decision in *Reynolds Metals*, will cleave to it until it is directly overturned, despite the clear mandate of this Court's intervening decisions.[12] It is not for a lower court, however, to pick and choose which decisions of this Court it will follow. *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring). *Accord The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867) (if the lower court did not adhere to Supreme Court precedent, there would be "mischievous consequences").

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and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration").

[11] *See, e.g., Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (retroactivity of Supreme Court case declaring tax unconstitutional); *Reich v. Collins*, 513 U.S. 106 (1994) (tortured use of Georgia statute to deny refunds of unconstitutional taxes); *Newsweek v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (vacating a decision of the Florida Supreme Court barring the taxpayer from pursuing a refund claim).

[12] *See, e.g.*, Judge Maddox's concurring opinion in the court below:

> [A]lthough I realize that the Supreme Court has released some opinions that could be interpreted as indicating a change in that Court's view of the constitutionality of state taxes such as that at issue in this case, the fact remains that the Supreme Court refused to review this Court's decision in *Reynolds Metals*, and that, as of today, *Reynolds Metals* remains the law.

(App. A at 6a.)

In this case, the Supreme Court of Alabama embraced a bogus theory of *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama's judicial alchemy succeeds, state courts will become Wonderland, a place where the rules no longer matter. If taxpayers win by the rules, the States—like the Queen of Hearts in her game of croquet—will consider themselves free to change them.[13] The stakes here, however, are much greater than those encountered in a fanciful game of croquet. Accordingly, the Court should end its willing suspension of disbelief concerning the State's commitment to protect the constitutional rights of business taxpayers and thereby vivify the core values of the federal system and the Supremacy Clause.

Stated simply, the purpose of the Due Process Clause is to protect constitutional rights against arbitrary actions by the government, but what is more arbitrary than using distended legal principles to deny an opportunity to be heard? In *Richards*, this Court admonished Alabama against distorting the doctrine of *res judicata* to prevent taxpayers from seeking redress of wrongs in a court of law. But the courts below did not hear, and the distortions regrettably continue. It is obvious that the Court "cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Alabama's attempt to deprive taxpayers of their rights should be stopped.

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[13] *See* Lewis Carroll (Charles L. Dodgson), *Alice's Adventures in Wonderland*, ch. VIII (1865) (The Queen's Croquet-Ground).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and remand the case for a refund of the unconstitutionally collected taxes.

Respectfully submitted,

TIMOTHY J. MCCORMALLY
Counsel of Record
MARY L. FAHEY
TAX EXECUTIVES INSTITUTE, INC.
1200 G Street, N.W.
Suite 300
Washington, D.C. 20005-3814
(202) 638-5601
Counsel for Amicus Curiae
Tax Executives Institute, Inc.

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IN THE

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OCTOBER TERM, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

The brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the Petitioners in the above-quoted matter.*

* No Counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief and their letters have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is submitting this brief because its members have expressed significant concern over the procedural ramifications to state tax appeals if the Alabama Supreme Court's and Circuit Court's decisions remain as law and because its members have always been at the forefront of the fight against discriminatory state taxes. COST's membership consists of over 500 multistate corporations involved in interstate and international commerce. COST is a nonprofit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. In the last five years, COST has filed at least ten briefs with this Court expressing its concerns over discriminatory and unconstitutional state tax systems.[1] Many of COST's members are engaged in business in the State of Alabama and, thus, have a particular interest in the validity of Alabama's franchise tax system. Further, the Alabama court's expansive application of the doctrine of *res judicata* directly challenges many members' historic approach to the management of tax litigation in Alabama and elsewhere. Finally, all COST members are injured by unconstitutional state burdens on interstate commerce through increased costs and decreased market access.

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[1] *E.g., NACCO Indus. v. Tracy*, 118 S. Ct. 882 (1998); *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998); *Koch Fuels v. Clark*, 117 S. Ct. 301 (1996); *Thiokol Corp. v. Mich. Revenue Div.*, 117 S. Ct. 2448 (1997); *General Motors Corp. v. Tracy*, 519 U.S. 278 (1996); *GMC v. Kansas City*, 516 U.S. 909 (1995); *ANR Pipeline Co. v. Kan. Director of Property Valuation*, 513 U.S. 917 (1994); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Reich v. Collins*, 513 U.S. 106 (1994); *Geoffrey, Inc. v. S.C. Dep't of Revenue and Taxation*, 510 U.S. 992 (1993).

SUMMARY OF ARGUMENT

This Court has accepted review of two issues raised by the Petitioners: (1) does the Alabama franchise tax violate the Commerce Clause and (2) did the Alabama courts violate Petitioners' Due Process rights by barring Petitioners' case under the doctrine of *res judicata*. Based on the straight forward application of this Court's prior decisions, the answer to both of these questions is "YES". First, Alabama's franchise tax violates the Commerce Clause because on its face it imposes a different tax system on out-of-state companies than on in-state companies and in fact it imposes a higher incidence of tax on out-of-state companies than on in-state companies. Decades U.S. Supreme Court precedent, including *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), hold that under the Commerce Clause a state may not discriminate in its tax system in favor of local companies over out-of-state companies. Second, the Alabama Courts'[2] decision that Petitioners' case is barred on *res judicata* grounds because of an earlier case challenging the same franchise tax abrogates the Petitioners' constitutional rights under the Due Process Clause to a day in court. The Petitioners were not parties to the earlier case, had no legal relationship with the parties in the earlier case, and had no notice of, and were not even aware of, the earlier case until after a decision by the Alabama Circuit Court. This Court only two years ago, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), instructed the Alabama courts that they cannot apply *res judicata* if the cases at issue did not involve the same taxpayers.

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[2] Because it is not clear whether the Alabama Supreme Court's decision against the Petitioners was based on Commerce Clause grounds or on the *res judicata* grounds relied on by the Circuit Court, *amicus* has referred to the judicial body deciding the *res judicata* issue as merely "the Alabama courts".

SUMMARY OF THE TAX

Alabama's corporate franchise tax applies a different tax base and a different tax rate to out-of-state corporations than to in-state corporations. In-state corporations (corporations incorporated in Alabama, Ala. Code § 40-14-40 (1998)), are subject to franchise tax solely on the par value of their stock (the rate is $10 per $1,000). Ala. Code § 40-14-40 (1993). Par value is a figure chosen by the issurer (*i.e.*, taxpayer) and is basically an artificial amount, generally unrelated to either the actual capital of a corporation or the original investment in a corporation. As a result of par value constituting the entire base of the tax for in-state corporations and the value being a number assigned by the taxpayer, in-state corporations have virtually carte-blanche to determine their own Alabama franchise tax burden.

On the other hand, out-of-state corporations (corporations incorporated in states other than Alabama, Ala. Code § 40-14-41(a)), are taxed on their actual capital employed in Alabama (the rate is $3 per $1,000). § 40-14-41(b). "Actual capital" includes: (a) outstanding capital stock; (b) surplus and undivided profit; (c) long-term debt; (d) certain related party debt; and (e) accelerated depreciation. *Id.* Inasmuch as the amount of capital a corporation employs in Alabama is dictated by business decisions generally independent of tax decisions, out-of-state corporations are not able to manipulate their franchise tax base in Alabama. The predictable result of such a tax system is that in-state corporations pay less franchise tax than if they had been incorporated outside of Alabama.

ARGUMENT

I. THE ALABAMA FRANCHISE TAX VIOLATES THE COMMERCE CLAUSE BECAUSE IT IMPOSES A DIFFERENT AND MORE BURDENSOME FRANCHISE TAX ON OUT-OF-STATE CORPORATIONS THAN ON SIMILARLY SITUATED IN-STATE CORPORATIONS.

There can be no genuine argument that the Alabama franchise tax is constitutional under the Commerce Clause. Petitioners have fully explained the reasons that the Alabama franchise tax is unconstitutional and *amicus* will not repeat their arguments here. *See Petitioners' Brief*, pp. 25-32. However, *amicus*, as an organization devoted to the abolition of discriminatory state taxes, will briefly outline what it sees as this Court's bright-line rules for establishing a non-discriminatory tax and how the Alabama franchise tax has violated those rules.

On its face, the Alabama franchise tax impermissibly discriminates between out-of-state and in-state corporations in violation of the Commerce Clause. A tax is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992). The Alabama franchise tax employs two different tax bases and which tax base a taxpayer is subject to is dependent entirely on which side of the Alabama state line a corporation is incorporated. For taxpayers incorporated in Alabama, the tax base consists of an arbitrary measurement unrelated to actual business activity and controlled and chosen by the taxpayer itself. For taxpayers incorporated outside Alabama, the tax base is computed based on the taxpayer's capital in Alabama which is dictated by business decisions. This Court has repeatedly stated that facial discrimination against interstate commerce is virtually

per se invalid, *see e.g., Fulton Corp.*, 516 U.S. at 331; *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994), and, as such, the Alabama franchise tax must be unconstitutional.

The Alabama franchise tax also discriminates *in fact* against out-of-state corporations. This Court has a clear substantive rule that "no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (citations omitted). The Alabama Circuit Court specifically found that the record proves that the Alabama franchise tax imposes a higher level of taxation on out-of-state corporations than would be imposed on such corporations if they were in-state corporations. *Petitioners' Appendix B*, 21A-22A. As in all of the other discrimination cases addressed by this Court, the "obvious effect of the tax is to extend a financial advantage [to the in-state corporations] at the expense of the [out-of-state corporations]." *Id.* at 331. This higher level of taxation directly and negatively affects an out-of-state corporation's profits and pricing.[3] Such blatant discrimination has never been tolerated by this Court.

[3] COST's members have repeatedly expressed disbelief that a tax that so blatantly puts out-of-state corporations at a competitive disadvantage by increasing their costs vis-à-vis in-state corporations is still being enforced. The foundation for the Commerce Clause has always been to foster an open market between the states. Such a market can only exist through free and unburdened competition. This Court has consistently recognized the importance of competition to our national economy and the contribution of the Commerce Clause to the cultivation of competition. *See H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality"). To the extent that a company incorporated outside of Alabama pays more in tax than a company incorporated within Alabama, competition is diminished and another step is taken toward state economic balkanization.

Further, it is now clear that Alabama's franchise tax on out-of-state corporations cannot be supported under the compensatory tax doctrine as complementary to the domestic shares tax. In *Fulton Corp.*, this Court specifically stated that a tax on corporate stock was not the functional equivalent of an income tax on the issuer and, thus, the compensatory tax doctrine did not apply. This Court went on to state that "we doubt that [a showing of the requirements of the compensatory tax doctrine] can ever be made outside the limited confines of sales and use taxes." *Fulton Corp.*, 516 U.S. at 344. If such a showing ever could be made, it was not made here as Alabama offered absolutely no proof as to the actual economic equivalency of the foreign franchise tax and the domestic shares tax.[4]

In sum, the Alabama franchise tax is unconstitutional under the Commerce Clause because it imposes, both on its face and in fact, a greater burden on out-of-state corporations than on in-state corporations with no equivalent in-state tax to compensate for this burden. The tax is a classic example of a discriminatory tax and is therefore abhorred by this Court's constitutional jurisprudence.

[4] See Petitioners' Brief at p. 30 for an application of the three requirements for a compensatory tax under *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 103 (1994).

II. ALABAMA HAS DENIED THE PETITIONERS ACCESS TO ITS COURTS UNDER THE DOCTRINE OF *RES JUDICATA* DIRECTLY IN CONTRAVENTION OF THE U.S. SUPREME COURT'S 1996 RULING THAT THIS INTERPRETATION OF *RES JUDICATA* VIOLATES THE DUE PROCESS CLAUSE.

Using the doctrine of *res judicata,* the Alabama courts prohibited Petitioners from pursuing their case because an earlier case had held that the challenged tax was constitutional. *Amicus* fears that the practice followed by the Petitioners of holding their case in abeyance pending the resolution of a lead case, which is standard practice in state tax controversies, led to the *res judicata* ruling. Such a ruling directly, unnecessarily, and unconstitutionally threatens the continued use of this practical and efficient procedure.

The procedural issue that *amicus* is concerned about arose because one of the taxpayers asked to hold its case in abeyance until a case that was ahead of it procedurally, *White v. Reynolds Metals Co.*, 558 So. 2d 373, was finally determined. The affected taxpayer agreed to this procedure because there was a possibility that the *Reynolds* case would resolve the constitutionality of the Alabama franchise tax and make further taxpayer litigation unnecessary. This procedure saved money and time for both the Petitioners and the Alabama Department of Revenue. Ultimately, the Alabama Supreme Court determined in *Reynolds* that the Alabama franchise tax was constitutional and, thus, ruled against the taxpayers. This Court denied *certiorari* in *Reynolds*, 496 U.S. 912 (1990), and the Alabama Supreme Court decision became the final adjudication of that case.

Following the final determination of the *Reynolds* case, several distinguishing events occurred that differentiated the Petitioners' case from *Reynolds.* First, the Petitioners

completed an extensive statistical study that proved that out-of-state corporations in fact paid more franchise tax than in-state corporations. This study and its conclusion were adopted as a finding of fact by the Alabama Circuit Court; thus, its validity is no longer in question. *See Petitioners' Appendix B,* 21a-22a. Such a study had not been undertaken by the taxpayers in *Reynolds.* Second, this Court decided several pivotal Commerce Clause cases, including *Fulton,* emphasizing that no discrimination was tolerable under the Commerce Clause and that the compensatory tax doctrine was to be narrowly applied. Notwithstanding these subsequent events and the lack of connection between the Petitioners and the taxpayers in *Reynolds,* the Alabama courts found that as a result of *Reynolds,* Petitioners' claims were precluded under the doctrine of *res judicata.*

Amicus is concerned that the procedure of holding a case in abeyance while another case finishes the appellate process was the reason that the Petitioners were found to be barred by *res judicata.* One judge in the majority specifically characterized this procedure as the basis for his decision. *Opinion of Justice Maddox* concurring specially. *Petitioners' Appendix A,* 1a-6a. Holding a case in abeyance pending a decision in a lead case is a common practice utilized by taxpayers and taxing authorities alike to preserve resources and allow for the orderly administration of taxes. Typically, a taxpayer whose case is being held in abeyance does not participate in any way with the lead case. In most circumstances, the lead case resolves all issues for the tax authority and other taxpayers. In these cases, the losing parties will usually withdraw any remaining claims. However, in some cases, as represented here, the lead case does not ultimately address all of the positions of the follow-up taxpayers. When this happens, taxpayers expect to and in fact have been able to proceed with their own case. Inasmuch as parties to cases procedurally behind a lead case do not know until the lead

case has been finally determined whether all of their own claims will actually be addressed, such parties do not have sufficient information at the beginning of their case to choose whether to be bound by the lead case or to proceed independently with their own. The system of holding a case in abeyance without forfeiting the right to pursue one's own case strikes the appropriate balance between judicial economy and the preservation of the right to a hearing. The Alabama court's decisions have disrupted this balance.

The ability to hold a case in abeyance without forfeiting the right to pursue the case in court is necessary for the rational operation of the courts. Frequently, when a tax is challenged as invalid, a significant number of taxpayers will file refund claims to protect their interest in the event that the tax is struck down. At the same time, the taxing authority will continue to assert the validity of the tax and issue assessments against those taxpayers who do not comply. Such claims and assessments must be filed before the concluion of the lead case because the statute of limitations on the refunds and assessments would otherwise expire.[5] If a taxing authority is required to litigate each of these claims in full while waiting for the lead case to be decided, then the tax authority will be quickly overwhelmed by the volume of cases involving one, isolated issue. Even if only a few cases are pursued, this will still lead to an increased burden on strained government staffs. The administrative and judicial tribunals responsible for hearing the refund cases and appeals will similarly be overwhelmed with a burdensome case load. Finally, it is a financial drain on both taxpayers and the tax authority to litigate each case rather than waiting for the ultimate outcome of one lead case.

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[5] The need for taxpayers to file a protective refund claim before challenges to the tax have reached fruition has recently been exacerbated by the trend among the states to impose very short statute of limitations on such claims. *See, e.g.*, Mich. Comp. Laws § 205.57a(6) (90 days); N.C. Gen. Stat. § 105-267 (30 days).

It is *amicus's* expectation that absent intervention by this Court, Alabama's interpretation of *res judicata* will be adopted by other states and taxpayers will be forced to protect their interests in all jurisdictions, not just in Alabama. If an interpretation that a taxpayer has agreed to be bound by a prior taxpayer's case by merely agreeing to hold a case in abeyance, regardless of the facts in that case or intervening contrary decisions, is not explicitly invalidated, taxpayers will pursue their cases rather than hold them in abeyance even though to do so may be a repetitive exercise resulting in a waste of taxpayer's and government's time.

As a result of the Alabama courts' decisions below, judicial and economical savings through the abeyance procedure will be unavailable to the sensible taxpayer. No informed taxpayer will agree to hold a case in abeyance knowing that such a move may effectively foreclose the opportunity to litigate one's own facts, under one's own legal theories, with one's chosen legal counsel. Thus, from a practical standpoint, the anticipated effect of the Alabama courts' decisions is patently unworkable and could lead to disruption in the tax judicial system.

From a legal perspective, the Alabama courts have confused the doctrine of *res judicata* with the concept of precedent and *stare decisis*. The *Reynolds* case did precede the Petitioners' case and in the absence of distinguishing precedent or facts might have provided a legal basis under the doctrine of *stare decisis* for ruling against the Petitioners on the merits. But the Alabama courts instead invoked *res judicata* to prevent the Petitioners from even receiving a ruling on the merits on the theory that Petitioners' claims are actually precluded by *Reynolds*. Neither claim nor issue preclusion can possibly apply as between *Reynolds* and the Petitioners' case because the cases involved different taxpayers, different tax years, different facts, different proof, and new controlling precedent. Such a use of *res judicata* is not only inappropriate, it is also specifically prohibited by the Due

Process Clause of the Fourteenth Amendment and by the prior decisions of this Court.

This is not the first time that Alabama has attempted to use *res judicata* to deprive taxpayers of their right to protest a tax. It is also not the first time that this Court has considered Alabama's application of *res judicata.* In *Richards v. Jefferson Cty.*, 517 U.S. at 802, a case also involving Alabama taxpayers and the Alabama courts, this Court held that unrelated parties could not, consistent with due process, be held bound by *res judicata* principles. Notwithstanding the clear mandate in *Richards,* the Alabama courts have failed to note any of the traditional elements of *res judicata* in the current that this Court has accepted as fulfilling due process requirements. The Petitioners were not parties in the *Reynolds* case, had no privity with the parties in the *Reynolds* case, and did not have any special relationship with the parties in the *Reynolds* case. The taxpayers in the *Reynolds* case were not representatives of a class covering the Petitioners nor was there any special judicial procedure, such as bankruptcy, that would require the Petitioners to be bound by the judgment in *Reynolds.* The taxpayers in *Reynolds* did not consult with Petitioners regarding the case or seek in any way to determine and protect the Petitioners' interests. As such, the Alabama courts have violated the Petitioners' due process rights by binding the Petitioners to a case in which they had no legal connection.

If the Petitioners cannot challenge the Alabama tax because of *res judicata* there appears to be no party that could challenge and invalidate the illegal tax. The result is that an obviously unconstitutional tax not only remains on the books, but continues to be enforced against all Alabama taxpayers. Currently there are numerous other taxpayers whose court cases have been put on hold until a final decision is reached in Petitioners' case. Based on the Alabama courts' reasoning, these taxpayers would be

similarly precluded from pursuing their rights if the Petitioners are foreclosed from the challenge. There are also dozens of refund claims pending at the administrative level. Are each of these claims precluded under *res judicata* principles because of the *Reynolds* (and now *South Central Bell*) case? At exactly what point will a taxpayer once again be able to challenge the tax? Two years; three years; ten years from now? And, in the interim, Alabama will continue to impose and enforce its unconstitutional franchise tax.

Prior precedent of this Court establish non-controversial and easily applicable rules for determining whether a tax violates the Commerce Clause and whether binding taxpayers to an earlier case is inconsistent with Due Process requirements. Applying these rules to this case leads to the irrefutable conclusion that the Alabama tax does discriminate against out-of-state taxpayers in favor of in-state taxpayers and thus violates the Commerce Clause and Petitioners' cases are not precluded under the doctrine of *res judicata* because they were not parties to the earlier case, their interests were not represented in the earlier case, and they did not have adequate notice of the earlier case..

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

DIANN L. SMITH
Vice President—Counsel
JEFFREY A. FRIEDMAN *
Vice President—Counsel
WILLIAM D. PELTZ
BOBBY L. BURGNER
Chair and Vice Chair, Lawyers' Coordinating Subcommittee
COMMITTEE ON STATE TAXATION
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222

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* Counsel of Record

(10)

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In The

Supreme Court of the United States

October Term, 1998

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,

Petitioners,

vs.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,

Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF *AMICI CURIAE* AVON PRODUCTS, INC., BURGER KING CORPORATION, CYTEC INDUSTRIES INC., DARDEN RESTAURANTS, GEORGIA-PACIFIC CORPORATION, HEALTHSOUTH CORPORATION, INSILCO CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, R.J. REYNOLDS TOBACCO COMPANY, AND TRICON GLOBAL RESTAURANTS, INC. IN SUPPORT OF PETITIONERS

WILLIAM L. GOLDMAN
Counsel of Record
CARL R. ERDMANN
McDERMOTT, WILL & EMERY
Attorneys for Amici Curiae
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

149562

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, following the same practice that this Court condemned in *Richards v. Jefferson County*, 517 U.S. 793 (1996), deprived petitioners of the due process of law guaranteed by the Fourteenth Amendment by barring them from presenting a federal constitutional challenge to a state tax on the theory that petitioners were bound by a prior state-court judgment in a case to which they were not parties, in which they were not represented, and of which they had no notice.

2. Whether Alabama's franchise tax impermissibly discriminates against interstate commerce, in violation of the Commerce Clause, by taxing Alabama corporations only on the par or stated value of their stock (the amount of which is determined solely by the corporation itself) while taxing out-of-state corporations on the value of essentially all their capital employed in Alabama, with the demonstrated result that Alabama corporations on average pay less than one-fifth of the franchise tax they would pay if they were incorporated outside Alabama.

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CONSENT OF THE PARTIES

Written consents of petitioners and respondents have been obtained and filed with the Clerk of the Court.[1]

INTEREST OF *AMICI CURIAE*

Pursuant to S. Ct. R. 37, Avon Products, Inc., Burger King Corporation, Cytec Industries Inc., Darden Restaurants, Georgia-Pacific Corporation, HealthSouth Corporation, Insilco Corporation, Matsushita Electric Corporation of America, Inc., The Prudential Insurance Company of America, R.J. Reynolds Tobacco Company, and Tricon Global Restaurants, Inc. ("*amici*") respectfully submit this brief as *amici curiae* in support of petitioners in the above-captioned case.

Amici, corporations organized under laws of States other than Alabama (referred to herein as "foreign corporations"), are engaged in interstate commerce, including doing business in Alabama. Consequently, *amici* are subject to the discriminatory Alabama franchise tax on foreign corporations. Ala. Code § 40-14-41 (1993). This case is important to *amici* because Alabama continues to collect this tax from *amici* in reliance on *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990) ("*Reynolds*"). This places *amici* at a competitive disadvantage to corporations engaged in business in Alabama that are organized under the laws of Alabama (referred to herein as "domestic corporations").

Furthermore, it is apparent that Alabama believes that any attempt by *amici* to seek judicial review of the tax also would be barred by *res judicata* as a result of *Reynolds*. Thus, *amici* have an interest in both issues in this case.

1. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Alabama continues to rely on *Reynolds* to avoid judicial review of its discriminatory taxing scheme despite the direct conflict with due process and Commerce Clause[2] decisions of this Court.

Alabama's "extreme application" of *res judicata* directly conflicts with *Richards v. Jefferson County*, 517 U.S. 793 (1996) ("*Richards*"), by depriving petitioners, who were strangers to *Reynolds*, of due process. Alabama has, in effect, retroactively established an involuntary type of class action. In addition, petitioners are deprived of the ability to rely not only on subsequent Commerce Clause decisions of this Court but also on further factual development, a harsher result than applies to the parties themselves in an earlier tax case. This is unprecedented and plainly violates petitioners' (and *amici's)* due process rights.

The unconstitutionality of Alabama's discriminatory taxation of foreign corporations has been confirmed by subsequent decisions of this Court, which have repudiated the constitutional analysis in *Reynolds*. Consequently, it is important for this Court to bring Alabama's reliance on *Reynolds* to an end.

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2. U.S. Const. art. I, § 8, cl. 3.

ARGUMENT

I.

IN ADDITION TO BEING IN DIRECT CONFLICT WITH *RICHARDS*, ALABAMA'S "EXTREME APPLICATION" OF *RES JUDICATA* IS PARTICULARLY VIOLATIVE OF DUE PROCESS BECAUSE IT WOULD PERMANENTLY BAR STRANGERS TO THE *REYNOLDS* LITIGATION FROM BEING ABLE TO RELY ON SUBSEQUENT DECISIONS OF THIS COURT.

As petitioners demonstrate, Alabama's "extreme application" of *res judicata* directly conflicts with this Court's decision in *Richards*, another case from Alabama. As in *Richards*, the application of *res judicata* to petitioners, who were strangers to *Reynolds*, "deprive[d] them of the due process of law guaranteed by the Fourteenth Amendment." *Richards*, 517 U.S at 797. A party's due process right to obtain its own judicial review of a disputed issue is fundamental and stems from a "deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilkes*, 490 U.S. 755, 762 (1989) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, 447 (1981)). There is no meaningful distinction between this case and *Richards*.

Alabama apparently contends that *res judicata* is applicable here because petitioners and the taxpayers in *Reynolds* "can be said to be members of the same class." Respondents' Brief in Opposition ("Br. in Opp.") at 7. According to Alabama, this means that petitioners (and, presumably, *amici)* were "adequately represented by the taxpayers in *Reynolds*." Br. in Opp. at 7.

Alabama's application of *res judicata* to create a completely new and unprecedented involuntary type of class

action, without any of the usual class action protections for absent parties,[3] is directly foreclosed by *Richards*. Like the taxpayers in the case prior to *Richards*, the taxpayers in *Reynolds* --

> did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind [any non-parties].

Richards, 517 U.S. at 801.

Alabama argues that the *Reynolds* taxpayers "adequately represented" petitioners because the *Reynolds* taxpayers "had every reason to protect [their own] interest." Br. in Opp. at 7 (emphasis added). Further, Alabama argues the *Reynolds* taxpayers --

> possess the resources to vigorously pursue their own best legal interests, and they did so. They were

3. *See, e.g.*, Fed. Rule of Civ. Proc. 23; Ala. Rule Civ. Proc. 23. *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) ("*Phillips*"), a class action case, where this Court stated:

> [The absent plaintiff must receive] minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

> represented in the prior litigation by some of the top law firms in the State of Alabama, which rendered to them more than competent representation.

Br. in Opp. at 8 (emphasis added).

The issue here, however, is not whether the *Reynolds* taxpayers were adequately represented by counsel or whether they vigorously pursued their own best legal interests. The issue here is whether parties who were strangers to the *Reynolds* litigation were adequately represented in the *Reynolds* proceeding. As this Court confirmed in *Richards*, adequate representation of absent parties would require that the *Reynolds* proceeding --

> at least . . . be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."

Richards, 517 U.S. at 801, (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)). It is far too late now for Alabama to attempt to establish retroactively that the petitioners in this case and the *Reynolds* taxpayers "are of the same class" and that *Reynolds* could have the preclusive effect of a class action.[4]

Here, as in *Richards*, "there is no reason to suppose that the [court in the prior decision] took care to protect the interests of the petitioners" or that the taxpayers in the prior suit "understood their suit to be on behalf of absent . . . taxpayers." *Richards*, 517 U.S. at 802. The court in *Reynolds* did not purport

4. Under Alabama's view of class actions, the affected class would expand indefinitely to include foreign corporations engaging in business in Alabama for the first time long after *Reynolds* was decided.

to form a class, and petitioners (and a*mici)* had no notice that they could be bound by that case, no opportunity to be heard or to opt out, and no connection whatsoever with the taxpayers in *Reynolds*. There is no justification for depriving petitioners (and *amici)* of the standard due process that is routinely accorded absent plaintiffs in a formal class action proceeding monitored by a court to ensure "adequacy of representation, the jurisdiction possessed over the class, and any other matter that will bear upon proper representation of the absent plaintiffs' interest." *Phillips*, 472 U.S. at 809.

The "extreme application" of *res judicata* in this case also has the effect of preventing taxpayers who were strangers to *Reynolds* from being able to rely on subsequent Commerce Clause precedent of this Court, including cases that are directly contrary to *Reynolds*. It is hard to imagine a more "extreme application" of *res judicata* given the general recognition that the parties themselves in an earlier case are not prevented from relying on such subsequent decisions of this Court when subsequent tax years are litigated. *See Limbach v. Hooven & Allison Co.*, 446 U.S. 353 (1984) ("*Hooven II*"); *Commissioner v. Sunnen*, 333 U.S. 591 (1948) ("*Sunnen*"); *see also State v. Plantation Pipeline Co.*, 265 Ala. 69, *cert. denied,* 352 U.S. 943 (1956).

In *Sunnen*, this Court rejected the attempt by the Commissioner of Internal Revenue to invoke collateral estoppel in a subsequent tax year, noting that collateral estoppel --

> is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

Sunnen, 333 U.S. at 599 (emphasis added).[5] Alabama should not be able to create a vested right in a decision that has become obsolete or was erroneous. It is interesting to note that, in *Sunnen*, there was no suggestion that the more preclusive doctrine of *res judicata* was potentially available.

The result in *Hooven II* is particularly illuminating. In *Hooven II*, the taxpayer argued that the Ohio Tax Commissioner was barred by collateral estoppel because of the prior holding in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) ("*Hooven I*"), which held that the "original package" doctrine of the Import-Export Clause of the United States Constitution prevented the State from taxing certain imported goods. However, the original package doctrine was subsequently

5. In the present case, intervening developments of both the law and significant facts have occurred. As discussed below, the legal basis upon which *Reynolds* was decided was unequivocally rejected by this Court in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) ("*Fulton*"); *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) ("*Oregon Waste*"); and *Associated Indus. v. Lohman*, 511 U.S. 641 (1994) ("*Associated Industries*"). Further, the Alabama Supreme Court based the decision in *Reynolds* in part upon an asserted lack of proof that the franchise tax in fact discriminates against foreign corporations. *Reynolds*, 558 So. 2d at 384-388. The trial court in this case found no such evidentiary gaps.

> The Court finds that the Taxpayer's evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation.

Pet. App. at 21a-22a (footnote omitted). ("Pet. App." references are to the appendices to the Petition for a Writ of *Certiorari* to the Supreme Court of Alabama in this case). Since intervening developments in both the law and the facts have occurred, collateral estoppel would be inapplicable even if the parties were the same.

invalidated in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), although the Court never specifically overruled *Hooven I*. The Ohio Supreme Court agreed with the taxpayer's argument that, notwithstanding the intervening decision of this Court, the Commissioner was collaterally estopped from re-litigating the validity of the original package doctrine in *Hooven II* because *Hooven I* dealt with the same issues and the same taxpayer. In reversing, this Court held that:

> [t]he years involved in this tax case, however, are not the same tax years at issue in *Hooven I*. Because of this, *Commissioner v. Sunnen*, *supra*, is pertinent and, indeed, is controlling . . . .

Hooven II, 466 U.S. at 362. This Court held that collateral estoppel could not override this Court's intervening pronouncement, noting that the reason for limiting the scope of collateral estoppel is especially strong when important constitutional issues are involved and the "constitutional analysis of the earlier case is repudiated by this Court's intervening pronouncement." *Id.*[6]

In this case, Alabama's application of *res judicata* enables Alabama to avoid compliance with the unmistakable effect of this Court's decisions in *Fulton, Oregon Waste,* and *Associated Industries* (which have repudiated the constitutional analysis of *Reynolds*). Thus, in addition to being in direct conflict with *Richards*, the "extreme application" of *res judicata* also is

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6. It is interesting to note that Alabama's theory would result in a different interpretation of the United States Constitution in Alabama. Commerce Clause precedent would continue to evolve in other States while frozen in time in Alabama. This result, in and of itself, could violate the Commerce Clause as it could lead to barriers to competition and economic Balkanization, consequences that the Commerce Clause was intended to prevent. *Oregon Waste*, 511 U.S. at 98-99.

contrary to *Sunnen*, and is plainly a denial of due process. How can a stranger to an earlier decision be more bound by that decision than the parties to that decision would be? *Amici* urge the Court make it plain to the States that resorting to spurious procedural obstacles in order to avoid this Court's precedent will not be countenanced.

II.

ALABAMA'S TAX PLAINLY VIOLATES THE COMMERCE CLAUSE, AND ALABAMA INAPPROPRIATELY RELIES ON *REYNOLDS* TO AVOID COMPLIANCE WITH THIS COURT'S DECISIONS IN *FULTON, OREGON WASTE*, AND *ASSOCIATED INDUSTRIES*.

Alabama's franchise tax on foreign corporations, Ala. Code § 40-14-41 (1993), discriminates against foreign corporations in direct violation of this Court's Commerce Clause precedent. As the trial judge found --

> the Taxpayer's evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation.

Pet. App. at 21a-22a (footnote omitted). This Court has consistently invalidated such discriminatory taxes. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Fulton; Associated Industries;* and *Oregon Waste*.

Alabama's defense of its discriminatory treatment of foreign corporations against Commerce Clause challenge is its reliance on the compensatory or complementary tax doctrine as applied in *Reynolds*. In setting forth its complementary tax argument in its brief in this case to the Alabama Supreme Court,

the State made no fewer than 18 references to *Reynolds*. State Department of Revenue's Brief to Ala. Sup. Ct. ("DOR Brief"), at 23–34 (May 25, 1997). *See also* Br. in Opp. at 10-17, where there are fifteen references to *Reynolds*.

But the subsequent opinions of this Court in *Fulton, Oregon Waste*, and *Associated Industries*, which more fully delineated the three requirements for application of the compensatory or complimentary tax doctrine, directly repudiate the Alabama Supreme Court's analysis in *Reynolds*. For example, in *Reynolds*, the Alabama Supreme Court stated:

> The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations. We emphasize the term "invidiously" because the tax will be sustained if its classifications are rationally related to a legitimate state purpose and because, in enacting taxing statutes, legislatures are not required to reach equality with mathematical precision.

558 So. 2d at 382. But, in *Associated Industries*, this Court rejected as irrelevant the State's motive in enacting a tax, stating:

> [A] court need not inquire into the purpose or motivation behind a law to determine that, in actuality, the law impermissibly discriminates against interstate commerce.

511 U.S. at 653. This Court also confirmed in *Associated Industries*, that there is a "strict rule of equality" in applying the complementary tax doctrine. The State must show that its

tax on interstate commerce does not exceed its tax on intrastate commerce. *Associated Industries*, 511 U.S. at 646.

In this regard, petitioners have conclusively demonstrated that the franchise taxes on domestic and foreign corporations are not equal in view of the ability of domestic corporations to reduce their tax liability by reducing the par value of their stock. Alabama does not dispute the fact that domestic corporations can reduce their tax liability, arguing instead that --

> foreign corporations can reduce their tax liability by reducing the capital they employ in Alabama, just as domestic corporations can reduce their tax liability by reducing the value of their shares of stock.

Br. in Opp. at 12. It is amazing that Alabama would make such an argument since it reveals, as plainly as possible, the discriminatory effect of Alabama's disparate taxing system: domestic corporations can reduce their taxes by reducing the par value of their stock, but foreign corporations can reduce their taxes only by reducing the capital they employ in Alabama — that is, by moving or selling business operations located in Alabama. The two are hardly comparable. Such economic protectionism is a direct affront to the Commerce Clause and the precedent of this Court.[7]

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7. This Court has repeatedly recognized the necessity of treating the Nation as one economic unit:

> [I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Oregon Waste, 511 U.S. at 98 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979)); *see generally* The Federalist No. 42 (James Madison). "[O]ur economic unit is the Nation, which alone has the gamut

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A similar argument was rejected in *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71 (1992) ("*Kraft*"), where this Court said:

> We have previously found that the Commerce Clause is not violated when the differential tax treatment of two categories of companies "results solely from differences between the nature of their businesses, not from the location of their activities." We find no authority for the different proposition advanced here that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business.

Kraft, 505 U.S. at 78 (citation omitted). It is unthinkable that a discriminatory tax could be upheld simply because a taxpayer could diminish the tax by moving or selling operations located in the State, a much more significant consequence than changing the domicile of a corporation. Furthermore, Alabama's argument is wrong in any event. Even if a foreign corporation reduced its capital employed in Alabama by moving operations out of the State, discrimination would not be "avoided." The tax would still discriminate with respect to the corporation's remaining capital employed in Alabama.

The Alabama Supreme Court in *Reynolds* also failed to analyze, as required by this Court's decisions, whether the taxes in issue (the domestic franchise tax and the domestic shares

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of powers necessary to control the economy, . . . [and] has as its corollary that the states are not separable economic units." *Oregon Waste*, 511 U.S. at 98-99 (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949)).

tax paid by domestic corporations and the foreign franchise tax paid by foreign corporations) were imposed on "substantially equivalent" events so that they served "as mutually exclusive prox[ies] for each other." *Oregon Waste*, 511 U.S. at 103; *Fulton*, 516 U.S. at 340 n.6. The domestic shares tax, an *ad valorem* personal property tax imposed upon Alabama residents on the value of stock holdings, and the franchise tax on foreign corporations, which is imposed on capital employed in the State, are not imposed on substantially equivalent events. Ala. Code § 40-14-70 (1985 Supp.) and Ala. Code § 40-14-41.[8] If Alabama wants to tax corporations on the amount of their capital employed in Alabama, it can and should impose such a tax on a nondiscriminatory basis on both domestic and foreign corporations. Until it does so, a separate decision to tax domestic corporations' capital stock cannot serve as a basis for taxing only foreign corporations on their capital employed in Alabama.

Alabama argues that this Court's post-*Reynolds* decisions "do not constitute a significant (if any) departure from the standards in effect at the time" *Reynolds* was decided. DOR Brief at 32; *see also* Br. in Opp. at 14. That argument, if correct, merely confirms that *Reynolds* was wrong when it was decided. In any event, the point is that this Court has set forth unequivocal standards for applying the complimentary tax doctrine to discriminatory taxes. *Reynolds* is in direct conflict with those standards and Alabama's continuing reliance on *Reynolds* should not be tolerated.

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8. It also is questionable whether the franchise tax on domestic corporations based on par value of their stock (Ala. Code § 40-14-40) (1993), and the franchise tax on foreign corporations are imposed on "substantially equivalent events."

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

WILLIAM L. GOLDMAN
Counsel of Record
CARL R. ERDMANN
McDERMOTT, WILL & EMERY
Attorneys for Amici Curiae
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

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